84-265

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984
No._____

STATE OF CALIFORNIA,

Petitioner,

v.

LEE EDWARD HARRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

I

Whether the use of a racially neutral voter registration list as the sole source for the selection of jurors in Los Angeles County systematically excludes (Duren v. Missouri (1979) 439 U.S. 357) Blacks and Hispanics in the jury selection process because of their failure to register to vote in the same proportion as their representation in the community at large?

II

Whether petitioner should be given the opportunity under the Federal Constitution or Duren v. Missouri (1979) 439 U.S. 357 of presenting evidence attempting to justify resort to a neutral list such as the voter registration list in the selection of potential jurors following the California Supreme Court ruling below reversing the trial court's

finding that respondent failed to establish a prima facie violation of the fair cross-section requirement?

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OPINION BELOW

The majority, concurring and dissenting opinions of the California Supreme Court are reported as People v. Harris (1984) 36 Cal.3d 36, 201 Cal.Rptr. 782, ___ P.2d____, and appear at pages 1 through 101 of the Appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3) to review a judgment of the California Supreme Court which was entered on April 20, 1984 (see Appen., pp. 1-82) and became final on June 20, 1984. (See Appen., p. 102.) This Petition for Writ of Certiorari is filed within 60 days following entry of final judgment and is therefore timely filed. (United States v. Healy (1974) 376 U.S. 75, 77-80, and cases cited.)

The instant judgment is a final decision rendered by the highest court of the State of California interpreting

rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, in relevant part:

> "Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATUTORY PROVISIONS INVOLVED

Section 187 of the California Penal Code is reproduced at page 151 of the Appendix.

Former sections 190.2 subd. (c)(3)(i), (c)(3)(v), and (c)(5) of the California Penal Code are reproduced at pages 152 through 154 of the Appendix.

Section 211 of the California Penal Code is reproduced at page 154 of the Appendix.

Section 459 of the California Penal

Code is reproduced at pages 154-155 of the Appendix.

Section 1239 of the California Penal Code is reproduced at page 155 of the Appendix.

Section 197 of the California Code of Civil Procedure is reproduced at pages 156-157 of the Appendix.

Section 203 of the California Code of Civil Procedure is reproduced at pages 157-158 of the Appendix.

Section 204.7, subdivision (a) of the California Code of Civil Procedure is reproduced at pages 158-159 of the Appendix.

Section 206 of the California Code of Civil Procedure is reproduced at page 160 of the Appendix.

STATEMENT OF THE CASE

A. Statement of the Proceedings

Following denial of respondent's motion to quash the jury venire on the ground that use of a voter registration list as the sole source for the selection of the jury pool in Los Angeles County deprived him of his right to trial by an impartial jury drawn from a fair cross-section of the community, a jury found respondent guilty of two counts of murder (Cal. Pen. Code, § 187) with special circumstances (former Cal. Pen. Code, § 190.2, subds. (c)(3)(i), (c)(3)(v), (c)(5)), two counts of robbery (Cal. Pen. Code, § 211), and one count of burglary (Cal. Pen. Code, § 459). The jury determined that the penalty for respondent should be death. (Appen., p. 2.)

Respondent's appeal of his conviction to the California Supreme Court was automatic in view of the judgment of death. (Cal. Pen. Code, § 1239.) On April 20, 1984, the California Supreme

Court, in a 4-to-3 decision, reversed the ruling of the trial court and held that respondent's statistical showing satisfied the requirement of Duren v. Missouri (1979) 439 U.S. 357, of establishing a prima facie showing of constitutional invalidity of jury pools based solely on random selection from a voter registration list thus denying respondent his Sixth Amendment right to an impartial jury drawn from a representative cross-section of the community. (Appen., pp. 7-49.) The plurality opinion of the California Supreme Court held that the judgment of conviction had to be reversed because petitioner failed to present any rebuttal evidence attempting to show justification for the use of the voter registration list even though it may not perfectly reflect population. (Appen., pp. 47-49.) The concurring opinion of the California Supreme Court, however, indicates that the proper remedy in the instant case was a remand to the trial court for further evidentiary proceedings to allow petitioner the opportunity to present

rebuttal evidence. The concurring opinion concluded a remand was proper in view of the fact that the reason petitioner did not present any rebuttal evidence was the trial court's ruling that respondent's statistical showing failed to establish a prima facie case. (Appen., pp. 83-89.)

On June 20, 1984, the California Supreme Court denied petitioner's Petition for Rehearing (Appen., p. 102) which urged that the case be remanded to the trial court for further evidentiary proceedings. (Appen., pp. 133-150.) On the same date, the California Supreme Court denied petitioner's application for stay of issuance of the remittitur and for an order deferring the execution and enforcement of the judgment. (Appen., p. 105.) The remittitur was issued by the California Supreme Court on June 21, 1984. (Appen., p. 104.)

On July 23, 1984, Mr. Justice William H. Rehnquist issued a written opinion denying petitioner's request for a stay of enforcement of the judgment of the California Supreme Court pending

timely filing and disposition by this Court of a Petition for Writ of Certiorari. (Appen., pp. 129-132.) Mr. Justice Rehnquist concluded that the "procedural snarl" of petitioner failing to present evidence justifying resort to the use of the voter registration list, even though it may not perfectly reflect population, is "likely to deter some members of this Court who would wish to review the substantive issues involved in this case from voting to grant certiorari." (Appen., p. 131.)

B. Statement of Facts Adduced at the Motion to Quash the Jury Venire

1. The Jury Commissioner's Testimony

Raymond Arce, The Director of Juror Services Division of the Los Angeles County Superior Court, described the procedures employed at the time of respondent's trial in 1979 to select potential jurors for Los Angeles

County.[1] At that time, the sole source used in Los Angeles County for selecting potential jurors was a random draw from the list of registered voters. (Def. Spec. Exh. D., pp. 357-429.)[2] There are

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1. It was stipulated that the trial court could read and consider the testimony given by Mr. Arce on a similar motion before a different trial judge (Judge Tevrizian). (See R.T. p. 385; Def. Spec. Exh. D.) Mr. Arce's testimony is contained in Defense Special Exhibit D but the pages are not numbered. Thus, the page references regarding Mr. Arce's testimony refers to the actual page numbers of Mr. Arce's testimony before Judge Tevrizian.

2. Mr. Arce testified that 29 of California's 46 counties used "multiple sources' in the selection of potential jurors. (Def. Spec. Exh. D., p. 365.) Since 1981 the use of the list from the Department of Motor Vehicles has been required to be used by counties in conjunction with the voter registration list where the existing system " . . .

no available statistics on the ethnic background and citizenship of the individuals who appear on the voter registration list. (Def. Spec. Exh. D., p. 372.)

Mr. Arce and his staff drew names randomly by computer from the list of registered voters. The potential jurors were selected by assigning a random number to each name on the voter registration list. After an assignment was made to all names on the list, names were selected for jury service from the lowest number to the highest number. The number of voters selected corresponds with the number of jurors Mr. Arce and his staff previously determined were needed. (R.T. pp. 368-372.)

Questionnaires were mailed to the inidividuals selected from the random draw from the voter registration list. The completed questionnaires which were returned were used to exclude individuals

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can be practically modified without significant cost." (Cal. Code Civ. Proc., § 204.7, subd. (a).)

as prospective jurors and to complete the master jury pool. The questionnaires, which were mailed at the rate of 10,000 to 15,000 per week, asked several questions including whether the individual would be willing to serve on a jury in a courthouse more than 20 miles from his or her home. California Code of Civil Procedure section 206, subdivision (a) provides that the Jury Commissioner may exempt from jury service any juror who completes an affidavit requesting to be exempted from traveling to a courthouse more than 20 miles from the individual's home. Other reasons for excluding an individual as a prospective juror include lack of citizenship, lack of residency in Los Angeles County, lack of ability to read and understand English, a criminal record, presence of individual or community hardship, and financial hardship. (Def. Spec. Exh. D., pp. 325-329, 361-362, 368-371.)

2. Professor Butler's Testimony

Professor Edgar Butler, Chairman of

the Sociology Department at the University of California at Riverside, conducted a study during a three-month period in 1979 of the jurors who were actually summoned to the Long Beach Courthouse (where respondent's trial was held) and compared those figures with figures that he compiled for the entire County of Los Angeles. Based on this comparison, Professor Butler concluded that the jurors called to the Long Beach Courthouse did not reflect the composition of Los Angeles County and thus did not represent a fair cross-section of the community. (R.T. pp. 310-379.)[3/]

Between May 5, 1979 and August 15, 1979, Professor Butler conducted a study of the jurors who were actually summoned to the Long Beach Courthouse. The study was conducted as follows: Professor

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3. "R.T." refers to the "Reporter's Transcript" of the trial court proceedings and which was included as part of the record before the California Supreme Court.

Butler asked the Jury Clerk to provide a questionnaire (see Def. Spec. Exh. D., p. 30) to each new juror summoned each day. When the members of the jury panels arrived at the courthouse, they were provided the short questionnaire. The questionnaire, made up by Professor Butler, asked questions regarding sex, education, age, ethnicity and income. The jurors were advised that filling out the form was voluntary. The Jury Clerk collected the questionnaires and turned them over to Professor Butler who tabulated the answers. The Jury Clerk did not check the forms when they were turned in to verify whether the information was accurate or true. (See Def. Spec. Exh. D., p. 30; R.T. pp. 323-325, 362-363.)

Ninety-eight percent of all potential jurors who appeared at the courthouse filled out the questionnaire. It must be noted, however, that during the week of May 16, 1979, more forms were returned than were passed out. (See Def. Spec. Exh. D., p. 9; R.T. pp. 325-326.)

The results of the survey revealed

the following regarding the racial ethnicity of the jurors who actually reported for jury duty at the Long Beach Courthouse between May 5, 1979 and August 15, 1979:

Caucasian	85.8
Black	5.5
Hispanic	3.4
Other	3.4
Unknown	1.8
	99.9*

"Comparative disparity" is a process of ascertaining a lessened probability of a certain class of persons to be called as jurors in relation to their population. Comparative disparity figures indicate the percentage of probability that a particular group has of being selected as a juror compared with another group. (See Def. Spec. Exh. D., p. 27; R.T. pp. 329-331.)

The 1970 Federal Census indicated that 18.3 percent of Los Angeles County was Hispanic and 10.8 Black. Professor

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*Rounding error. (R.T. p. 328; Def. Spec. Exh. D., p. 10.)

Butler projected that in 1980, 33 percent of Los Angeles County would be Hispanic and 15 to 17 percent Black. (R.T. pp. 314-316, 319-322, 333.) Using the 1970 figures and the concept of comparative disparity, Professor Butler concluded that Hispanics have an 81 percent less chance and Blacks have a 49 percent less chance of being selected for jury duty in Long Beach than the general population or Caucasian population. (See Def. Spec. Exh. D., pp. 1, 2; R.T. p. 332.) Using 1975 statistics based on "Angelinos on the Move," Professor Butler concluded that Hispanics have an 84 percent less chance of being selected as jurors while Blacks have a 53 percent less chance. (See Def. Spec. Exh. D., pp. 1, 2; R.T. p. 332.) Although Professor Butler did not testify as to the exact disparity when his 1980 projected figures were used, it appears, using his definition of comparative disparity, that Hispanics would have approximately 90 percent less chance of being selected jurors (33 percent in the county and 3.4 percent show-up at the Long Beach Courthouse).

(See Def. Spec. Exh. D., pp. 1, 2, 27; R.T. pp. 331-333.)

During the pendency of this appeal in the California Supreme Court below, respondent presented population figures based on the 1980 census which revealed that the 1980 Black population in Los Angeles County was 12.6 percent, and the Hispanic population was 27.6 percent. These figures obviously became available after respondent's 1979 trial, but the California Supreme Court below, over petitioner's objection, took judicial notice of these figures (Appen. pp. 33-34) and computed the comparative disparity as 56.3 percent for Blacks and 87.7 percent for Hispanics (Appen. p. 14-15).

Professor Butler testified that the jurors who appeared at the Long Beach Courthouse during his three month study were representative of the voter registration list (R.T. p. 354) but it was his opinion that the list did not represent a fair cross-section of the community and that continued use of it would result in increasingly less

representation of the community because of the downward trend in individuals registering to vote, especially the low percentage of minorities (Hispanics, Blacks, poor, low income, low educated) who are not inclined to register to vote. (R.T. pp. 339-344; see Def. Spec. Exh. D., p. 32.)

Professor Butler acknowledged that he had seen no evidence that the random sampling from the voter registration list was done in a racist, sexist, invidious or illegal manner. (R.T. pp. 354, 358-359.) Professor Butler was unaware of any list other than the voter registration list -- with the possible exception of death certificates -- which might be useful in determining citizenship. (R.T. pp. 353-354.)

3. The State Court Rulings

The trial court denied respondent's motion to quash the jury venire on the ground petitioner had not established a prima facie violation of the fair cross-section requirement because

respondent's comparisons were based on total population figures rather than the number of Blacks and Hispanics who were eligible to vote. (R.T. pp. 440-442.) Thus, petitioner did not present any rebuttal evidence attempting to justify use of the voter registration lists even though they may not perfectly reflect population since the trial court ruled respondent had not established a prima facie violation of the fair cross-section requirement. (See R.T. pp. 440-442.)[4/]

Following respondent's conviction, the California Supreme Court reversed the judgment of conviction in People v. Harris (1984) 36 Cal.3d 36, and held by a

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4. Petitioner has included in the Appendix the argument by counsel and the state trial court ruling at the motion to quash the jury venire to demonstrate that petitioner never waived the right to present rebuttal evidence but merely relied upon the trial court's ruling that such evidence was not necessary since respondent failed to establish a prima facie case. (See Appen., pp. 106-128.)

vote of 4-to-3 that the trial court ruling was in error because respondent had established a prima facie violation of the fair cross-section requirement by demonstrating a substantial disparity between the representation of Blacks and Hispanics on the voter list as compared with the representation in the population at large. (Appen., pp. 1-49.) The judgment of conviction was reversed by the California Supreme Court because petitioner failed to present any evidence to rebut respondent's prima facie showing. (See Appen., pp. 47-49.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

I

THE USE OF A RACIALLY NEUTRAL VOTER REGISTRATION LIST AS THE SOLE SOURCE FOR THE SELECTION OF JURORS IN LOS ANGELES COUNTY DOES NOT SYSTEMATICALLY EXCLUDE (DUREE V. MISSOURI (1979) 439 U.S. 357) BLACKS AND HISPANICS IN THE JURY SELECTION PROCESS BECAUSE OF THEIR FAILURE TO REGISTER TO VOTE IN THE SAME PROPORTION AS THEIR REPRESENTATION IN THE COMMUNITY AT LARGE

In order to establish a prima facie violation of the Sixth Amendment fair cross-section requirement and thus shift the burden to the State to justify the alleged underrepresentation a defendant must show:

> "(1) [T]hat the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in

venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." (Duren v. Missouri, supra, 439 U.S. at 364.)

This case presents the important question of whether a random draw from the voter registration list as the sole source for selection of potential jurors can be described as "systematically" excluding Blacks and Hispanics where their underrepresentation is due solely to their failure to register to vote in proportion to their representation in the community at large. A bare majority of the California Supreme Court below concluded that the use of a voter registration list as the sole source for selection of jurors in Los Angeles County produced underrepresentation of Blacks and Hispanics at the Long Beach Courthouse where respondent was tried and that the underrepresentation was due to

the systematic exclusion of Blacks and Hispanics in the jury selection process because members of those two groups tend to register to vote in a lower percentage than their proportion in the community. Petitioner submits the holding of the California Supreme Court below significantly alters who bears the burden of proof in a cross-section challenge by effectively eliminating the systematic exclusion requirement established by this Court in Duren.

The majority view of the California Supreme Court regarding the systematic exclusion requirement is directly contrary to decisions of this Court and numerous federal and state cases interpreting Duren. In Duren this Court found nothing wrong with the selection of jurors by the random sampling of a voter registration list but did find fault with "the system" which provided an automatic exemption to any woman who requested to be exempted from jury duty. Thus, the Missouri system inherently and systematically excluded women and resulted in underrepresentation on the

venire. (Duren v. Missouri, supra, 439 U.S. at 366-367.)

Likewise, in Taylor v. Louisiana (1975) 419 U.S. 522, the system used to select jurors systematically excluded women and thus they were underrepresented in the venire. In Taylor, a woman could not serve on the jury unless she filed a written declaration of her willingness to do so. (Taylor v. Louisiana, supra, 419 U.S. at 524.) These cases make clear that the particular system utilized to chose jurors must produce the underrepresentation.

The fact a particular group chooses not to register to vote does not mean that the use of the voter registration list as a means of selecting potential jurors systematically excludes members of the group who fail to register to vote. As noted by the Eighth Circuit Court of Appeal in United States v. Clifford (8th Cir. 1980) 640 F.2d 150, in analyzing the identical issue under the Jury Selection and Service Act, 28 U.S.C. sections 1861-1869:

"However, there has been no

showing that juries are not selected from a fair cross-section of the community or that there has been any exclusion of jurors based on any basis other than failure to register to vote. Absent the showing of systematic exclusion of a class of qualified citizens, voter registration lists may be used as the sole source of persons to serve on petit juries. [Citations omitted.] The mere fact that one identifiable group of individuals votes in a lower proportion than the rest of the population does not make a jury selection system illegal or unconstitutional." (United States v. Clifford, supra, 640 F.2d at 156; emphasis added.)

Numerous federal cases hold that the defendant has the burden under Duren of establishing how the particular jury system excludes the underrepresented group. Many of these cases reject the proposition that because a particular segment of society chooses to register to vote in a lower percentage than its

proportion in the population, there is something inherent in the system of using voter registration lists which results in underrepresentation. (See, e.g., United States v. Jones (8th Cir. 1982) 687 F.2d 1265, 1269-1270; United States v. Wesevich, supra, 666 F.2d 984, 990; United States v. Lewis (3rd Cir. 1972) 472 F.2d 252; Davis v. Zant (11th Cir. 1984) 721 F.2d 1478, 1482-1485.)

Numerous state cases have also rejected the proposition under Duren that because a particular segment of society chooses to register to vote in a lower percentage than its proportion in the population, there is something inherent in the system of using voter registration list which results in under-representation. (State v. Bernal (Ariz. 1983) 137 Ariz. 421, 671 P.2d 399, 404; State v. Gretzlar (Ariz. 1980) 126 Ariz. 60, 612 P.2d 1023, 1040; State v. Price (N.C. 1980) 272 S.E.2d 103, 111; see State v. Lopez (N.M. App. 1981) 96 N.M. 456, 631 P.2d 1324.)

Thus, the holding of the majority of the California Supreme Court below is

contrary to all existing authority. There has been no showing in the instant case of systematic exclusion. There is absolutely nothing in the jury selection process in Los Angeles County of random selection from a voter registration list which systematically excludes Blacks or Hispanics since use of the list is a totally racially neutral system. The jury selection system does not provide for any automatic exemption or exclusion for a certain segment of society as in Duren or Taylor. The system does not exempt broad categories or classes of people from jury service. Therefore, petitioner submits that the California Supreme Court below erroneously applied the sytematic exclusion requirement of Duren to the facts of this case.

II

PETITIONER SHOULD BE GIVEN THE OPPORTUNITY UNDER THE FEDERAL CONSTITUTION OR DUREN V. MISSOURI (1979) 439 U.S. 357 OF PRESENTING REBUTTAL EVIDENCE ATTEMPTING TO JUSTIFY RESORT TO A RACIALLY NEUTRAL LIST, SUCH AS A VOTER REGISTRATION LIST, IN THE SELECTION OF POTENTIAL JURORS FOLLOWING THE CALIFORNIA SUPREME COURT'S RULING BELOW REVERSING THE TRIAL COURT'S FINDING THAT RESPONDENT FAILED TO ESTABLISH A PRIMA FACIE VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT

This case presents the important question of law of whether the Federal Constitution or Duren v. Missouri, supra, require that petitioner be given an opportunity to present evidence rebutting respondent's prima facie case following a ruling by the California Supreme Court that the trial court's finding of no prima facie showing was in error.

In Duren v. Missouri, supra, this

Court stated:

> "The demonstration of a prima facie fair cross-section violation by the defendant is not the end of the inquiry into whether a constitutional violation has occurred." (Duren v. Missouri, supra, 439 U.S. at 367.)

The majority holding of the California Supreme Court, however, has, in fact, ended the inquiry and deprived petitioner of its right under Duren to present rebuttal evidence in an effort to attempt to justify the use of the voter registration roll as the sole source of selecting jurors in Los Angeles County. Petitioner never waived the issue of presenting rebuttal evidence. (Appen., pp. 106-128.) The reason petitioner never presented any rebuttal evidence in the trial court or the California Supreme Court was because of the trial court's ruling that respondent failed to establish a prima facie violation of the fair cross-section requirement. (See Appen., pp. 106-128.) Simply stated, there was absolutely no reason whatsoever for petitioner to present rebuttal

evidence in view of the trial court's ruling.

The California Supreme Court was the first court to conclude that respondent had, in fact, established a prima facie case of underrepresentation of Blacks and Hispanics on the voter list compared with their representation in the population at large. The proper remedy, as noted in the concurring opinion below, was to remand the case to the trial court in order to allow petitioner the opportunity to present rebuttal evidence in an effort to justify the use of the voter registration list as the sole source of selecting juries in Los Angeles County. Such a procedure is clearly proper under California Penal Code section 1260 and numerous cases interpreting that provision. (See Appen., pp. 106-128; People v. Vanbuskirk (1976) 61 Cal.App.3d 395, 405; In re Wells (1971) 20 Cal.App.3d 640, 651.)

Petitioner submits that the holding of the California Supreme Court below has effectively denied petitioner its rights under Duren to present rebuttal evidence

and thus demonstrate whether, in fact, a federal constitutional violation has occurred. Therefore, petitioner requests at the very least this Court grant certiorari to retain jurisdiction of the case and transfer the case back to the state court ordering it to hold further evidentiary hearings allowing petitioner the opportunity under Duren to present rebuttal evidence in an attempt to justify the use of the voter registration list as the sole source for the selection of jury panels.

A remand in the instant case would be in the interest of judicial economy and fair to all parties. It would also squarely confront the problem and determine whether the California courts are of the view that the use only of the voter registration list as the single source is, in fact, a violation of the Federal Constitution. In this case there is simply no valid reason for reversing the judgment of conviction where the issue can be resolved by further evidentiary proceedings in the trial court.

The ruling of the California Supreme Court has denied petitioner its rights under Duren v. Missouri. In short, the majority ruling of the California Supreme Court has denied the People of the State of California due process of law by denying them an opportunity to be heard on this case. (See Stein v. New York (1953) 346 U.S. 156, 196-197.)[5]

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5. In its Petition for Rehearing before the California Supreme Court petitioner unsuccessfully urged that court to remand the instant case to the trial court in order to provide the prosecution an opportunity to be heard on the issue. (See Appen., pp. 133-150.)

III

THE OPINION BELOW IS BASED ON FEDERAL CONSTITUTIONAL AUTHORITY

The instant decision of the California Supreme Court was based on an interpretation of the Sixth Amendment fair cross-section requirement as articulated by this court in Duren v. Missouri (1979) 439 U.S. 364. It is true that there are references to article I, section 18 of the California Constitution (Appen., pp. 8, 18) as well as discussion and citation of some state cases (Appen., pp. 18-25, 42-47, 49), but the conclusion reached by the majority of the California Supreme Court below was compelled by its construction and application of the three requirements for disproportionate juries as set forth by this Court in Duren. The court below supported its Duren analysis with reference to other federal cases and "the Constitution." (Appen., pp. 34-42.)

From the opinion below it clearly appears "that the state court decided the

case the way it did because it believed that federal law required it to do so." (Michigan v. Long, ____U.S.____, 77 L.Ed.2d 1201, 1214, 103 S.Ct.3469, 3476.) It thus clearly appears that the instant case was decided by the court below on federal constitutional grounds. Indeed, respondent conceded as much in his opposition to petitioner's request for a stay of enforcement of the judgment.

CONCLUSION

For the foregoing reasons petitioner submits that a Writ of Certiorari should issue to review the decision of the California Supreme Court, or at the very least this Court should grant Certiorari and order the case transferred to the state court for an evidentiary hearing to allow petitioner the opportunity under Duren and the Federal Constitution to present rebuttal evidence to the establishment of respondent's prima facie case.

Respectfully submitted,

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APPENDIX

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	) CRIM. 21633
Plaintiff and	) (Super.Ct.No. A-018568)
Respondent,	)
v.	) SUPREME COURT
LEE EDWARD HARRIS,	) F I L E D
Defendant and	) APR 20 1984
Appellant.	) LAURENCE P. GILL, Clerk
	) Deputy

1. Proceedings.

This is an automatic appeal from a judgment imposing a penalty of death, prosecuted under the 1977 death penalty legislation (Stats. 1977, ch. 316, §§ 4-14, pp. 1256-1262, former Pen. Code, §§ 190-190.6.) In an information filed October 16, 1979, defendant was charged with the murder of Hattie Marie Crumb and the murder of her husband Robert L. Crumb. Each murder charge was accompanied by three special circumstance

SEE CONCURRING AND DISSENTING OPINIONS

allegations. Those charges alleged the murders were committed during the commission of a robbery in violation of Penal Code section 211 (former Pen. Code, § 190.2, subd. (c)(3)(i)); that the murders were committed during the commission of a burglary in violation of Penal Code section 459 (former Pen. Code, § 190.2, subd. (c)(3)(v)); and that defendant was personally present and with the intent to cause the deaths physically aided or committed such act or acts causing the deaths of two human beings (former Pen. Code, § 190.2, subd. (c)(5)). The information also alleged in count III that defendant had committed burglary of the Crumb residence. Count IV charged defendant with the robbery of Hattie Marie Crumb in violation of Penal Code section 211, and count V charged defendant with the robbery of Robert L. Crumb.

A jury found defendant guilty of all counts and found true the special circumstance allegations as to counts I and II. The jury determined that the penalty for defendant should be death.

Defendant's motions for a new trial and to reverse the penalty verdict were denied. Defendant's appeal is automatic.

2. Facts.

The case against defendant was largely based on the testimony of Terry Avery, who was granted immunity from prosecution in exchange for her testimony. Avery's testimony was substantially corroborated by physical evidence and by expert witnesses.

Avery, who was 18 years old at the time, met defendant and Charles Moore in Denver, Colorado. In November 1977, the trio travelled in a stolen car from Denver to Kansas. In Lawrence, Kansas, they were involved in the abduction and the murder of Sam Norwood, the manager of a Woolworth store. Following that incident, the three took a bus from Kansas to Los Angeles for the purpose of robbing the apartment managers of a building in which Moore had lived in Long Beach

Moore, Avery and defendant arrived in Los Angeles on November 30, 1977. Moore told defendant about the managers'

jewlery collection and that the managers collected rents on the first of each month.

Moore took the others to the apartment building managed by the Crumbs at 921 East Broadway in Long Beach. They gained entry to the front gate of the building by waiting for a tenant, followed him as he unlocked the gate, and headed for the managers' apartment. Moore may have put on a stocking mask before he knocked on the door. When Mrs. Crumb cracked open the door, Moore pushed it in. Mrs. Crumb recognized Moore and he pushed her back into the living room. Moore and defendant had guns drawn as they entered the apartment; Avery followed them inside. Defendant grabbed the victim's husband from the couch and hit him with the gun. Moore struck Mr. Crumb with the butt of his gun and asked Mrs. Crumb for the rent receipts. She responded that the receipts had been deposited. Both victims were struck again with the guns, and then were tied up with adhesive tape. Their hands were bound behind their

backs, and they were gagged.

Avery was told to go into the bedroom to look for jewelry. She found and took jewelry from several containers and display cases. Defendant and Moore then entered and ransacked the bedroom looking for more jewelry.

Avery returned to the living room and defendant, who was kneeling over Mrs. Crumb, told Avery to go into the kitchen and find a knife. Avery found several knives in the kitchen, but lied to defendant, saying that she could not find any. Defendant went into the kitchen, found a butcher knife, returned to the living room and gave it to Moore. Defendant told Avery to pick up a pocketknife from a coffee table. She handed it to him. He opened the blade, returned it to Avery and told her to stab Mrs. Crumb. Avery superficially stabbed Mrs. Crumb while defendant twisted the gag around the victim's mouth. Defendant became angry with Avery telling her that she had not done it right. Defendant took the pocketknife from Avery, and she returned to the bedroom. Looking back

into the living room, Avery saw Moore stabbing Mr. Crumb with the butcher knife as defendant went over to hold down Mr. Crumb's legs. Moore stabbed Mr. Crumb for two or three minutes, then Moore started stabbing Mrs. Crumb in the back with the butcher knife. Moore then removed a diamond ring from her finger. Either defendant or Moore went through Mr. Crumb's wallet.

Both Robert and Hattie Crumb died of multiple stab wounds. All of the fatal wounds were inflicted with the butcher knife. Defendant did not stab either victim.

The trio returned to the Kona Motel, where they examined the jewelry. Avery received two rings and a bracelet, and defendant and Moore kept the rest. Defendant dismantled the guns, put the parts in a bag, and left the motel for 10 or 15 minutes saying he was going to throw the parts of the guns in the ocean. Avery, who was upset over the incident, returnd by bus to Denver the following morning.

Several weeks later, Avery met with

defendant and Moore in an apartment in Colorado. About two days later, she contacted the police and told them where to find Moore and defendant.

About one year later, police officers involved in the investigation of the murder of the manager of the Woolworth store in Lawrence, Kansas, drove defendant from Denver to Kansas. During that automobile ride, defendant, having been advised of his rights, admitted that he, Moore and Avery killed two people in Long Beach in 1977.

Defendant presented no witnesses at the guilt phase, and no substantial controvery surrounds the facts regarding the crimes leading to this trial. Defendant's primary contention concerns the system of selection of the jury venire.

3. Use only of voter registration lists deprives defendant of his right to a jury drawn from a representative cross-section of the community.

Prior to jury selection defendant moved to quash the jury venire on the

ground that use of the voter registration list as the sole source for the jury pool in Los Angeles County deprived defendant of his right to a trial by an impartial jury drawn from a fair cross-section of the community, as guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 16 of the California Constitution. Defendant claims that the use of the voter registration list as the sole source for the pool of jurors leads to the systematic exclusion and significant underrepresentation of Blacks and Hispanics, because of the low percentage of those eligible who register coupled with the proportionally lower registration rate of minorities compared to the White population. Respondent urges this court to reject defendant's claim because his statistical showing was based on total population figures rather than more refined data showing the ethnic breakdown of those eligible to serve as jurors.

(a) Burden of Proof

The problem of narrowing readily

available census figures to reflect a population defined to include only those presumptively eligible for jury service raises two fundamental questions presented by this case: Is use of total population figures sufficient to make a prima facie case of a violation of defendant's right to a jury drawn from a representative cross-section of the community? Which party has the burden of showing that a more narrowly defined population would or would not result in a disparity of constititutional consequence? We conclude that because of the difficulty in obtaining more accurate figures for jury eligibility, the defendant can present a prima facie case by showing through the use of total population figures a significant underrepresentation of a cognizble class. The burden then shifts to the state to demonstrate either that with more refined statistics, the underrepresentation would be reduced to a constitutionally insignificant disparity, or that there exists a compelling justification for the procedure which results in the

underrepresentation.

(b) Evidence at defendant's motion to quash the jury venire.

At the motion to quash the jury venire, the parties stipulated that the trial court could read and consider the testimony in a similar case of Raymond Arce, the Director of Juror Services Division of the Los Angeles County Superior Court. That testimony described the procedure employed at the time of this trial to select potential jurors. The jury commissioner drew names randomly from the list of the registrar of voters and mailed questionnaires to the people selected. Completed questionnaires were used to exclude individuals as prospective jurors and to compile the master jury pool. No follow-up procedure was used to pursue those who did not return the questionnaire.

In Mr. Arce's view, the main problem with the use of the sources in addition to voter registration would be the avoidance of duplication of potential jurors when the lists have few common

characteristics except for name and address. At the time of this trial, however, 29 of the 46 California counties were using multiple sources for identifying potential jurors. Since July 1, 1981, the use of multiple source lists has been required by the Code of Civil Procedure section 204.7.[1/]

1/ Code of Civil Procedure section 204.7, subdivision (a) provides: "Source lists of jurors shall identify persons who reside in the county, and who are 18 years of age or older, shall include those who are registered voters, and to the extent that systems for producing jury lists can be practically modified, without significant cost, shall also include those who have been licensed or issued an identification card pursuant to Article 3 (commencing with Section 12800) and Article 5 (commencing with Section 13000) of Chapter 1 of Division 6 of the Vehicle Code. Qualified jury lists and master jury lists derived from the source lists shall be prepared so as to reasonably minimize duplication of names."

In support of his motion to quash the jury venire, defendant offered evidence compiled by Professor Edgar Butler, chairman of the sociology department at the University of California at Riverside. Dr. Butler holds degrees in sociology and demography and has conducted studies of jury panels in all of the judicial districts in Los Angeles County. His qualifications are not challenged, and his work has been the basis for similar motions in other cases.

Dr. Butler conducted a survey of Long Beach Superior Court jury panels from May 5 through August 15, 1979. The survey compared the composition of jury venires appearing at the Long Beach courthouse to the composition of the entire County of Los Angeles. The survey involved only those potential jurors appearing at the Long Beach courthouse, not the original contact pool. The survey was conducted through the use of questionnaires distributed by the jury clerk. Nine hundred fifty-nine potential jurors, 98 percent of all those appearing at the courthouse, completed the voluntary

questionnaire. The forms asked questions regarding sex, age, education, income and ethnicity. The study revealed that for the period during which the survey was conducted, 5.5 percent of the Long Beach potential jurors were Black and 3.4 percent were Hispanic.

Dr. Butler's estimates of Los Angeles County populations were based on the 1970 census supplemented with later studies of population changes. The 1970 census indicated that 18.3 percent of Los Angeles County was Hispanic and 10.8 percent Black. Dr. Butler estimated that in 1975, Los Angeles was 21.3 percent Hispanic and 11.6 percent Black. He projected that in 1980, 33 percent of Los Angeles County would be Hispanic and 15 to 17 percent would be Black. Dr. Butler's estimate did not exclude illegal aliens, persons under 18 years of age, or others who would be statutorily ineligible to serve as jurors.

Comparing these county-wide figures to the results of the jury venire surveys, Dr. Butler testified that the

comparative disparity[2/] for Blacks was 49 percent using 1970 figures, 53 percent for 1975, and 67 percent for 1980. For

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2/ Social scientists employ different techniques for measuring disparities involving jury representativeness. Several of these methods are described in detail in Kairys, et al., Jury Representativeness: A Mandate for Multiple Source Lists (1977) 65 Cal.L.Rev. 776 (hereafter cited as Kairys).

Briefly, the simplest method is the absolute disparity standard. It measures the difference between the proportion of the studied group in the overall population of presumptively eligible jurors and the proportion of the group appearing in the pool of jurors used by the state.

The second, and according to the authors, preferred method, is the comparative disparity standard. This standard measures how the use of voter lists alters the probability that a member of a particular cognizable group will be summoned to serve on a jury.

Hispanics the comparative disparities were 81 percent for 1970, 84 percent for 1975, and 90 percent for 1980.

Defendant has also presented other

Some courts have applied the statistical significance test to measure representativeness. (See Castaneda v. Partida (1977) 430 U.S. 482, 496-497, fn. 17; People v. Buford (1982) 132 Cal.App.3d 288, 297; see also Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases (1966) 80 Harv.L.Rev. 338, 353-356; Kairys, supra, 65 Cal.L.Rev. at p. 792.) This test describes the probability that the absolute disparity would appear by chance in a random draw from the population.

We do not at this time adopt one method of measurement to the exclusion of the others. Rather, it will be helpful when possible in any particular case to compare the results under the various techniques in deciding whether disparity suggests a constitutional violation.

figures based on the 1980 census,[3/] which, of course, became available after defendant's trial. Those figures show that the 1980 Black population in Los Angeles County was 12.6 percent, and the Hispanic population was 27.6 percent. The comparative disparity for 1980 using these figures are 56.3 percent for Blacks and 87.7 percent for Hispanics.

We recognize that Long Beach juries are not selected evenly from all parts of Los Angeles County. Code of Civil Procedure Section 203 provides that "in the County of Los Angeles no juror shall be required to serve at a distance greater than 20 miles from his or her residence." It is likely that most of the jurors interviewed by Dr. Butler at the Long Beach courthouse came from within a 20-mile radius of the courthouse, a fact which may account to some degree for the discrepancy in racial

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3/ We take judicial notice of the federal census. (Evid. Code, § 452, subds. (b), (c) and (h); People v. Williams (1883) 64 Cal. 87, 91.)

representation between the persons interviewed and the county population.

The parties, however, presented evidence and argued this case on the assumption that all juries in Los Angeles County must be representative of the entire county. The principal question before us is whether evidence based on total countywide population figures, rather than jury-eligible population, is adequate to make out a prima facie case; for the reasons explained in this opinion, we conclude that it is. The state has not attempted to rebut this prima facie showing by arguing that the Long Beach juries need only represent those persons living within 20 miles of the courthouse, and has not attempted to show that such juries were truly representative of that limited area.

(c) The trial court's ruling on the motion to quash the jury venire

The trial court concluded that "the use of a single-source method of creating a prospective jury panel had caused a problem because of the failure of certain members of the citizenry to register to

vote. This then, according to the evidence presented, may tend to create a bias in terms of age or ethnicity." However, the trial court denied the motion to quash the jury venire on the ground that no showing of denial of a fair cross-section had been made because defendant's comparisons relied on the general population, and it was defendant's burden to show how many Hispanics and Blacks were "eligible to vote."

4. The fair cross-section principle.

It is a fundamental tenet that a criminal defendant is entitled to trial by an impartial jury drawn from a representative cross-section of the community. This right is guaranteed by the Sixth Amendment to the federal Constitution (Taylor v. Louisiana (1975) 419 U.S. 522, 530) as well as by article I, section 16 of the California Constitution (People v. Wheeler (1978) 22 Cal.3d 258, 272).

In Wheeler, which involved the use of peremptory challenges by the prosecutor to exclude Black jurors, we held that the

exclusion of prospective jurors solely on the ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community. (Id., at pp. 276-277.) Detailing a series of decisions by the Untied States Supreme Court holding that an impartial jury must be drawn from a representative cross-section of the community, Justice Mosk noted "[t]he rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to

the extent they are antagonistic, will tend to cancel each other out." (People v. Wheeler, supra, at pp. 266-267, fns. omitted.)

"This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible." (Thiel v. Southern Pacific Co. (1946) 328 U.S. 217, 220.) But it does mean that "a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." (People v. Wheeler, supra, at p. 277.)

If the system does produce representative juries, one would expect that over a period of time, the composition of the average jury pool would be roughly reflective of the makeup of the eligible community, and comparing the percentage of those groups appearing in jury pools to the percentage of the group in the general population, courts

obtain some measure of whether the system is successfully accomplishing its goal of selecting juries representative of a fair cross-section of the community.

Wheeler recognized that the ideal of a representative jury comprised of a fair cross-section of the community may be systematically compromised at the various stages of the selection process. Wheeler dealt with the stage of the proceedings where the parties exercise their statutory "peremptory" and "for cause" challenges to individual jurors sitting on the venire.[4/]

Wheeler also discussed the stage of the proceedings raising the issue of the instant case: the procedure of compiling the master list from which venires are drawn. "Obviously if that list is not

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4/ Though not at issue in that case, Wheeler also cautioned courts to be alert to prevent abuse of discretionary hardship exemptions which could tend to skew the representative cross-section goal. (See also People v. Buford, supra, 132 Cal.App.3d 288.)

representative of a cross-section of the community, the process is constitutionally defective ab initio." (People v. Wheeler, supra, 22 Cal.3d at p. 272.)

This case involves jury selection at the initial stage of the process, but not a claim of intentional exclusion of Blacks or Hispanics. The parties agree that this case does not involve a claim that the voter registration lists are unfairly compiled or that the jury commissioner purposefully discriminates in the selection of panels from the initial pool. Neither does defendant claim that the jurors who appeared at the Long Beach courthouse were not representative of the master list composed from the voter registration list.

5. Elements of a prima facie violation of the fair-cross-section requirement.

The question disputed by the parties is whether defendant met his burden of making a prima facie showing of constitutional invalidity of jury pools

based on random selection from a list derived solely from a voter registration list. "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." (Duren v. Mississippi (1979) 439 U.S. 357, 364.) Defendant asserts that the evidence presented at the motion to quash the venire met this standard and, having done so, the burden should have shifted to the state to come forward with either a more precise statistical showing that no constitutionally significant disparity existed or that there was a compelling justification for the procedure which results in the disparity in the jury pool.

(a) A "distinctive" group.

The first prong of the Duren test was met in this case, as the Attorney General concedes. Two showings have been suggested before an asserted group will be deemed to be a "distinctive" or "cognizable" group in the community. The members of the group "must share a common perspective arising from their life experience in the group, i.e. a perspective gained precisely because they are members of that group." (Rubio v. Superior Court (1979) 24 Cal.3d 93, 98 (lead opn.).) In addition, the party asserting the claim may have to show that "no other members of the community are capable of adequately representing the perspective of the group assertedly excluded. This is so because the goal of the cross-section rule is to enhance the likelihood that the jury will be representative of significant community attitudes, not of groups per se." (Ibid.)[5/]

5/ The validity of the second part of the Rubio test is questionable, since

Both Blacks and Hispanics share with other members of their groups a common perspective arising from their respective experiences as a group, and no other members of the community are capable of adequately representing their perspectives. Thus, Blacks and Hispanics are cognizable groups for purposes of fair cross-section analysis. (See e.g., Castaneda v. Partida (1977) 430 U.S. 482, 495; Hovey v. Superior Court (1980) 28 Cal.3d 1, 20, fn. 45.)

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the constitutional rule requiring a representative jury bars not only the exclusion of a group, but disporportionate reduction in its members; if some persons with a particular life experience are barred from the jury, others cannot properly represent the perspective of those excluded because the number of persons with that perspective will be disproportionately small. (See dis. opn. of Tobriner, J. in Rubio v. Superior Court, supra, 24 Calf.3d at p. 109 and cases there cited.)

(b) Fair representation of the group in relation to the number of such persons in the community.

It is the second requirement of Duren that the Attorney General claims defendant has not adequately demonstrated: that the representation of the studied group in the jury pool is not fair and reasonable in relation to the number of such persons in the community. The Attorney General claims that the primary flaw in defendant's statistical evidence is that it improperly compares the percentage of each cognizable group in the jury pool to the group's proportion of the total population rather than to its proportion among the group eligible to vote. The Attorney General implores this court to reject summarily any attempt to demonstrate disparate representation on the jury venire "unless it is based on a comparison of ethnic breakdown among those registered to vote against the ethnic breakdown of the venire."

Respondent misconstrues the thrust of defendant's argument. Defendant does not

claim that the jury venires do not comprise a fair cross-section of the voter registration list. Defendant claims, and has produced statistical evidence showing, that there is a large and increasing proportion of the general population that fails to register to vote, and that the proportion of minorities failing to register is larger than that for the general population. The national figures show that in 1972, 27.7 percent of those eligible to vote did not register. In 1976, the percentage of unregistereds increased to 33.3 percent and in 1978 to 37.4 percent. For minority groups, the percentage of eligible persons registering to vote is significantly below that of the general population.[6/] Thus,

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6/ The figures for the national percentage of Blacks not registered to vote are 34.5 percent in 1972, 41.5 percent in 1976 and 42.9 percent in 1978. The national figures for those of Spanish origin are 55.6 percent in 1972, 62.2 percent in 1976, and 67.1 percent unregistered in 1978.

use of voter registration lists as the sole source of selection results in underrepresentation of minorities on jury venires as well as underinclusion of the general population, many of whom, though otherwise eligible to serve as jurors, fail to register to vote. Despite the known risk of drawing unrepresentative juries, many counties have used voter registration lists as the source for venires because the qualifications of eligibility to vote are roughly equivalent to those for jury services.[7/]

7/ Compare the general provisions relating to qualifications to vote with those prescribing eligibility to serve as a juror.

California Constitution, article II, section 2, provides: "A United States citizen 18 years of age and resident in this state may vote." California Constitution, article II, section 3, provides: "The Legislature shall define residence and provide for registration and free elections." California Constitution, article II, section 4,

Thus, use of a voter registration list provides a population that is "pre-screened" for jury eligibility.

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provides: "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony."

Code of Civil Procedure section 198 sets forth the general rules of competency to serve as a juror: "A person is competent to act as juror if he or she is [¶] 1. A citizen of the United States of the age of 18 years who meets the residency of electors of this state; [¶] 2. In possession of his or her natural faculties and of ordinary intelligence . . .; and [¶] 3. Possessed of sufficient knowledge of the English language . . . ." Code of Civil Procedure section 199 disqualifies persons who have been convicted of malfeasance in office or any felony or other high crime, or any person serving as a grand juror. Sections 200 and 201

Respondent's specific objections to Dr. Butler's methods and the accuracy of his figures do not undermine the conclusion that a gross disparity exists. Respondent contends that the 1970 census figures were inacurate, the 1975 figures were based on the 1970 figures, the assumptions regarding underrepresentation were based on inaccurate figures, the study compared the entire population rather than those eligible for jury service, and the study was conducted for too short a period of time to draw any positive conclusions. In addition to these criticisms, the Attorney General finds fault with examining those who appeared at the courthouse rather than the "original contact pool."

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provide that persons shall be excused from jury service if it would entail undue hardship on the person or the public served by the person. Section 203 provides that in Los Angeles County, no person shall be required to serve at a distance greater than 20 miles from his or her residence.

As to the "inaccuracy" of the 1970 census, the evidence indicates that the census figures were inaccurate because they tend to undercount cultural minorities. Thus, any inaccuracy in the figures used for comparison for 1970 would tend to result in a lesser showing of a cross-sectional disparity than actually exists.

It may be true that the three-month period of the study is not as long as would be ideal to assure a greater degreee of reliability in the conclusions. However, the period is of sufficient length to suggest a pattern of gross disparity, and no suggestion has been made that if the study were conducted over a longer period of time, different results would appear.

We also reject respondent's objection that defendant's expert only surveyed those appearing at the courthouse, and not the original contact pool, some of whom failed to appear were excused for various reasons. The panel which tried defendant was drawn from those jurors who appeared. The representative character

of those jurors, not of the "original contact pool, is the proper basis for comparison with the county population figures.

Criticism has been appropriately leveled at the use of total population figures as the comparison base for showing underrepresentation. (People v. Lewis (1977) 74 Cal.App.3d 633, 646; People v. Mooring (1982) 129 Cal.App.3d 453; People v. Spears (1975) 48 Cal.App.3d 397, 404; People v. Powell (1974) 40 Cal.App.3d 107, 128-129, cert. den. 420 U.S. 994.) However, such criticism of the statistical short-comings of the use of total population figures fail to acknowledge the difficulty in obtaining more refined cmparison groups. As Professor Kairys has observed, "eligible population figures are almost impossible to obtain." (Kairys, supra, 65 Cal.L.Rev. at pp. 785-786, fn. 63.) The difficulty of the Federal Bureau of the Census in attempting to determine the citizenship status of Hispanics is illustrative: "A reliable estimate of the number of

undocumented aliens residing in the United States is not available and is unlikely for the immediate future." (Rep. To Cong. by Comptroller General, Number of Undocumented Aliens Residing in the United States Unknown, GGD-81-56 (Apr. 6, 1981) pp. 304.)[8/]

8/ Defendant has asked this court to take judicial notice of the cited document, along with several other studies that reach similar conclusions. The Attorney General opposes this second request for judicial notice on the ground that the documents relate to evidentiary matters that should have been presented to the trial court. We conclude that this court should take judicial notice of the requested documents. Those documents do not involve factual questions peculiar to this case. The cited report falls within the definition of official acts of the executive department of the United States. (Evid. Code, § 452, subd. (c); see also White v. State of California (1971) 21 Cal.App.3d 738, 743 (publication of the United States Army

In view of the difficulty in arriving at reliable figures for the jury eligible population for any particular cognizable class, total population figures have been accepted where the disparity resulting from the use of those figures is "somewhat greater" than if the narrower jury eligible group were used. "[I]t may be so difficult to obtain full and accurate figures for 'jury eligibles' that to require such figures would -- at least in some cases place an unsuperable burden on defendant . . . . [W]e will be content with a somewhat greater disparity when general population figures are used, simply because they do not clearly reflect the proper measure for a fair cross section: the number of persons actually eligible for jury service under valid statutory qualifications." (United States v. Butera (1st Cir. 1970) 420 F.2d 564, 570, fn. 13.)

Comparing the makeup of the actual

Corps of Engineers relating to navigability of a portion of the Petaluma River).)

jury pool with that of the entire population of persons presumptively eligible for jury service would be preferable to comparing with total population because if the cognizable class has a lower percentage of jury eligibles than the general population, a showing that that class' representation in the jury pool is less than the group's percentage of the general population does not necessarily show that the group is underrepresented. "Nevertheless, because it may be difficult to obtain full and accurate figures for jury eligibles and to require such data may place an insuperable burden on a litigant, this preference must accede to tolerance." (Foster v. Sparks (5th Cir. 1975) 506 F.2d 805, 833, Appen., An Analysis of Jury Selection Decisions by Hon. Walter P. Gewin, U.S. Circuit Judge.)

The question raised by the difficulty of producing statistics concerning the precise proportion of jury eligibles is who should bear the burden of proof on whether a disparity exists. In our view, although more refined statistics would be

preferable if available when they are not, it is sufficient for the defendant to show a significant disparity based on the use of total population figures. The burden then shifts to the state to either show that when the group total population is reduced to jury eligibles, no underrepresentation exists, or to justify the underrepresentation by showing "that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." (Duren v. Missouri, supra, 439 U.S. at pp. 367-368.)

We believe that this approach is supported by decisions of the United States Supreme Court holding that a prima facie case of underrepresentation is made on the basis of a disparity between the cognizable group's representation on jury panels and the percentage of those groups in the community as shown by total population census figures.

The jury challenge in Duren v.

Missouri, supra, 439 U.S. 357, involved a Missouri law that granted women who so requested an automatic exemption from jury service. The high court held that petitioner had satisfied the second prong of the prima facie test by use of statistics showing that women comprised 54 percent of the adult commnity, but only 15 percent of the jury venires from which juries were chosen. It rejected the speculation of the Missouri Supreme Court that changing population patterns and unequal voter registration between men and women rendered the census figures an unreliable frame of reference. (Id., at p. 365.) The court responded to those criticisms by declaring that "the fair-cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors were drawn with the makeup of the community, not of voter registration lists." (Duren, supra, at pp. 365, fn. 23; emphasis in original.)

Although a final conclusion as to whether the fair-cross-section requirement has been met should ideally

be based on comparison to the jury eligible community, we believe that the quoted language of the high court supports the conclusion that the initial burden may be met by showing significant underrepresentation of the cognizable group based on figures showing its total population in the community as a whole.

Castaneda v. Partida, supra, 430 U.S. 482 also supports the proposition that total population figures are sufficient to make a prima facie case of underrepresentation. Castaneda involved an equal protection challenge to the makeup of grand juries in Hildago County, Texas. The defendant in that case introduced statistical evidence based on the 1970 census showing that 79.1 percent of the population was Mexican-American, on the assumption that all persons of Spanish language or Spanish surname were Mexican-Americans. During an 11-year period, the average percentage of Spanish-surnamed grand jurors was 39 percent. The Texas Court of Criminal Appeals held that defendant failed to make out a prima facie case of

discrimination in grand jury selection on the ground that there was no showing by defendant regarding "how many females who served on the grand juries were Mexican-Americans married to men with Anglo-American surnames, how many Mexican-Americans were excused for reasons of age or health, or other legal reasons, and how many of those listed by the census would not have met the statutory qualifications of citizenship, literacy, sound mind, moral character, and lack of criminal record or accusation." (Castaneda, supra, 430 U.S. at pp. 489-490.) The United States Supreme Court disagreed, holding that the showing made by the defendant "shifted the burden of proof to the State to dispel the inference of intentional discrimination." (Id., at pp. 497-498.)

Presumably, the inference of intentional discrimination might have been dispelled by a showing by the state that no disparity would have resulted if the comparison had been made to the jury eligible population. Making its own calculations of the proportion of illegal

aliens based on breakdowns of native and foreign parentage and birth, the court concluded that the percentage of Mexican-Americans was somewhat less than the figure produced by the defendant. The court continued to refer to the population figures, however, "particularly since the State has not shown why those figures are unreliable." (430 U.S. at p. 487, fn. 6.) Similarly, in this case, there has been no showing beyond speculative assertions that the gross disparity evidenced by use of total population figures would be diminished were a comparison made with the jury eligible minority populations.

The respondent also describes defendant's use of the comparative disparity method of showing underrepresentation as a "resort to statistical contrivance," and asserts that courts have universally relied upon absolute disparity in deciding underrepresentation cases. But, even using the absolute disparity method, based on the 1980 census figures showing that Blacks comprise 12.6 percent and

Hispanics 27.6 percent of the population of Los Angeles County, underrepresentation of 7.1 percent for Blacks and 24.2 percent for Hispanics results.

Contrary to respondent's assertions, courts have recognized the inadequacy of measuring underrepresentation based merely on absolute disparity. (See, e.g., Bradley v. Judges of Superior Court for Los Angeles County (9th Cir. 1976) 531 F.2d 413, 416, fn. 8.) Experts who have studied the question conclude that the comparative disparity method is preferable. The theory of the comparative disparity method is simply stated. "[I]n a fair, cross-sectional system, the probability of any eligible person being included in the source (or in the final pool) would be the same for every eligible person, regardless of race, ethnic background, sex, age, or socio-economic status. The comparative disparity standard measures representativeness by the percentage by which the probability of serving is reduced for people in a particular category or cognizable class." (Kairys,

supra, 65 Cal.L.Rev. at p. 790.) The primary advantage of the comparative disparity method is that its results are not affected by the proportion of the population in the specified category.[9/] Thus, for example, in this case using the 12.6 percent figure for Blacks, under respondent's theory, all Blacks could be excluded from jury venires without producing an absoute disparity violative of the fair-cross-section principle. Clearly, the Constitution could not tolerate such a result.

Respondent asserts that random selection from a voter registration list as the sole source of potential jurors has been found constitutionally valid, citing Peole v. Sirhan (1972) 7 Cal.3d 710, 749-750, certiorari denied 410 U.S. 947, and that to find selection of jury panels from voter registration lists violative of the fair-cross-section

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9/ However, too small a sample size negatively affects the accuracy of the prediction. (See Kairys, supra, 65 Cal.L.Rev. at p. 795, fn. 103.)

requirement necessitates overruling Sirhan. In Sirhan, however, this court held that "[t]he use of voter registration lists as the sole source of jurors is not constitutionally invalid [citations], at least in the absence of a showing that the use of those lists resulted 'in the systematic exclusion of a "cognizable group or class of qualified citizens"' [citations], or that there was 'discrimination in the compiling of such voter registration lists.' [Citations.]" (Id., at pp. 749-750.) However, it is exactly the requirement of Sirhan regarding exclusion of a cognizable group that defendant has attempted to show.

Since Sirhan, the United States Supreme Court has made it clear that unlike equal protection analysis, when the defendant alleges violation of the Sixth Amendment fair-cross-section principle, no showing of intent to discriminate is required. "[E]qual protection challenges to jury selection and composition are not entirely analogous to the case at hand. In the cited cases, the significant discrepancy

shown by the statistics it only indicated discriminatory effect but also was one form of evidence of another essential element of the constitutional violation -- discriminatory purpose. Such evidence is subject to rebuttal evidence either that discriminatory purpose was not inovlved or such purpose did not have a determinative effect. [Citations.] In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement." (Duren v. Missouri, supra, 439 U.S. 357, 368, fn. 26.)

We conclude that defendant has made a showing sufficient to satisfy the second prong of Duren, "that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." (Duren, supra, 439 U.S. at p. 364.)

(c) Systematic exclusion of the group

Finally, to make a prima facie showing of a violation of the fair-cross-section requirement, defendant must show that the underrepresentation is due to "systematic exclusion of the group in the jury selection process." (Duren v. Missouri, supra, 439 U.S. at p. 364.) Respondent asserts that nothing in the process of random selection from voter registraation lists systematically excludes Blacks and Hispanics. Respondent refers to this court's statement in Pepole v. Sirhan, supra, 7 Cal.3d at p. 750, footnote 26, that those who choose not to register to vote are not a cognizable class, and respondent concludes that defendant "has not shown that it underrepresents any of those who choose to register to vote." Defendant complains that the system of solely using voter registration lists results in underrepresentation of Blacks and Hispanics compared to their proportions in the community.

Systematic underrepresentation means

that the disparity is "inherent in the particular jury-selection process utilized." (Duren v. Missouri, supra, 439 U.S. at p. 366.) In this case, defendant has made a showing adequate to demonstrate, in the absence of rebuttal evidence by the state, that the underrepresentation results from the process utilized to choose jury venires -- random selection solely from voter registration lists.

As we have explained, to make a showing of violation of the fair-cross-section requirement, the defendant need not show that the jury commissioner intended to discriminate against Blacks or Hispanics. All that needs be shown is that the system of selection results in denial of a jury pool representing a fair cross-section of the community. As the court said in People v. Superior Court (Dean) (1974) 38 Cal.App.3d 966, 971-972: "The decisions requiring the accused to show systematic, purposeful discrimination do not square with others which condemn discrimination stemming from negligence or intertia.

The latter recognize that official compilers of jury lists may drift into discrimination by not taking affirmative action to prevent it. In formulating a panel for a grand jury endowed with the criminal indictment function, officials must adhere to a standard more stringent than mere abstention from intentional discrimination; they have an affirmative duty to develop and pursue procedures aimed at achieving a fair cross-section of the community." (Fn. omitted.)

We hold that defendant has adequately met the third prong of the Duren test, showing systematic exclusion of Blacks and Hispanics in the jury selection process.

In sum, we hold that defendant's use of statistical evidence using total population figures was sufficient to make a prima facie showing of a gross disparity resulting in a violation of defendant's right to an impartial jury drawn from a fair cross-section of the community. The burden then shifts to the state to rebut the prima facie case. The state may be able to do so by showing

through use of figures defining those presumptively eligible for jury service that no disparity of constitutional significance exists, or that even with the use of multiple sources and all other practical means, a certain level of disparity is unavoidable. Finally, it may be able to justify the underrepresentation by showing "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion." (Duren v. Missouri, supra, 439 U.S. at pp. 367-368.) In the present case, however, the state has not attempted to rebut the defendant's proof but has shortsightedly rested its entire argument on the mistaken claim that defendant failed to present a prima facie case.

The error in concluding that defendant had failed to make a prima facie showing of a violation of his right to a jury drawn from a representative cross-section of the community is prejudicial per se. "'The right to a

fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'" (People v. Wheeler, supra, 22 Cal.3d at p. 283, quoting People v. Riggins (1910) 159 Cal. 113, 120.)

The foregoing reasoning leads us to conclude that defendant's conviction must be reversed. A majority of the justices of this court, however, do not agree on whether, and to what extent, the rule announced in this case should be given retroactive effect. We therefore take no position as to the disposition of other cases presenting issues concerning the representative character of juries selected from voter registration lists alone.[10/]

10/ For trials occurring after July 1, 1981, the problem may have been obviated by the statutory encouragement to institute multiple-source lists for

6. Issues relating to the special circumstances allegations.

Defendant raises several arguments attacking the use of multiple special circumstances in this case. Primarily, defendant contends that California statutory law and the federal Constitution prohibit the use of multiple special circumstances based on a unified course of conduct undertaken to further one principal criminal objective. Defendant urges that the functions and objectives of the special circumstances are not served by dividing a unified course of conduct into multiple special circumstances. In addition, their use in this case violates the statutory prohibition of double punishment embodied in Penal Code section 654. Finally, the charging of burglary (former Pen. Code, § 190.2, subd. (c)(3)(v)) and robbery (former Pen. Code, § 190.2, subd. (c)(3)(i)) special circumstances is improper in this case.

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selection of jury pools. (Code Civ. Proc., § 204.7.)

Defendant's theory is that the special circumstances concept cured the constitutional infirmities of the California death penalty law by narrowing the class of murderers subject to capital punishment and by helping to guide sentencing discretion, but that multiple charging of special circumstances does not serve either of these objectives, and in fact undermines the attempt to limit and direct the jury's sentencing discretion. Since only one special circumstance is necessary to identify capital defendants and trigger the penalty phase, the additional special circumstances serve only to skew the decision-making process and unfairly prejudice the defendant before the penalty jury.

Defendant's argument is unpersuasive. First, we note that the death penalty statute itself expressly contemplates charging more that one special circumstance. Former section 190.2 establishes the mandatory penalty "for a defendant found guilty of murder in the first degree . . . . in any case in which

one or more of the following special circusmtances has been charged and specially found . . ." (italics added). Additionally, other sections of the death penalty law implicitly recognize the possiblity of multiple special circumstances, with numerous references to "special circumstances," and "each . . . special circumstance."

Defendant contends that this language "may simply be recognition that two murders, each with its own special, can be joined . . ." If the Legislature had intended to limit special circumstances to one per murder count, it would have been a simple matter to so state. The plain words of the statute make clear that multiple special circumstances may be charged where there is supporting evidence.

Defendant argues that even if the statute is construed to allow multiple charging, such a practice is violative of federal constitutional principles, because he is unfairly prejudiced by the explicit requirement of former section 190.3, subdivision (a) that when

determining sentence the trier of fact consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circusmtances found to be true pursuant to Section 190.1." According to defendant, the jury is already aware of the underlying circumstances of the crime, so that a direction that the same facts be considered as special aggravating circumstances serves only to stack the cards against him.

Defendant does not dispute the obvious propriety of the penalty jury considering the circumstances of the murder (i.e., that it occurred in the course of a burglary, robbery, kidnaping, etc.; that it involved torture; that the victim was poisoned, and so on), but only takes exception to the designation of certain circumstances as "special circumstances." Former section 190.3 simply lists factors to be taken into account by the jury in determining the penalty. Since a finding of special circumstances is what triggers the

penalty phase to begin with, it seems clear that these circumstances are relevant to the penalty decision.

In a related argument, defendant contends that designating multiple special circumstances to be considered by the penalty jury "legislatively weights the sentencing factors," thus violating the Eighth Amendment requirement that a death sentence be decided only by the trier of fact.

This argument is inconsistent with recent United States Supreme Court decisions and decisions of this court upholding death penalty statutes. Former section 190.3 simply lists mitigating and aggravating factors to be taken into account by the penalty jury if relevant to a particular case. One of the factors listed is any special circumstance found true pursuant to former Penal Code section 190.1. This court discussed the listing of mitigating and aggravating circumstances as "'aspects of the Georgia scheme which a majority of the [United States Supreme Court] considered

essential to its constitutionality.'" (Frierson, supra, 25 Cal.3d at p. 176 (plurality opn. of Richardson, J.); quoting Rockwell v. Superior Court (1976) 428 U.S. 242, the lead opinion of this court recognized the appropriateness of including special circumstances in the section 190.3 list of factors: "We find worthy of note that the aggravating and mitigating factors enumerated in the Florida statute are almost identical to the special circumstances, and the aggravating and mitigating factors, described in the California act . . . Thus, although the California law would permit the trier of fact to consider evidence as to 'any matter' relevant to mitigation or aggravation (§ 190.3), the trier of fact is not left wholly unchecked and unguided in its determination for, as in Florida, the California statute lists specific factors which must be considered in deciding whether or not to impose the death penalty." (Frierson, supra, at p. 177.) It is therefore our view that multiple special circumstances may be charged in

appropriate cases. Nevertheless, we conclude that the federal Constitution and California statutory laws prohibit the cumulative use of special circusmtance allegations in this case.

The 1977 death penatly statute represents the California Legislature's attempt to comply with the high court's mandate in Furman v. Georgia (1972) 408 U.S. 238 and Gregg v. Georgia (1976) 428 U.S. 153 that the discretion of the jury to impose a sentence of death "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (Gregg, supra, 428 U.S. at p. 189 [opn. of Stewart, J., Powell, J. and Stevens, J.].) "[T]hat guidance must be provided by objective sentencing standards designed to compel the jury to 'focus on the particularized circumstances of the crime and the defendant.' (Fn. omitted; Id., at p. 199.)" (People v. Green (1980) 27 Cal.3d 1, 48.) In California, that guidance is provided by limiting the potential imposition of a death sentence to those first degree murders involving one or

more "special circumstance."

In those cases where the "defendant has been found guilty of murder in the first degree, and a special circusmtance has been charged and found to be true" (former Pen. Code, § 190.3), the trial proceeds to the penalty phase for the jury to determine whether the sentence shall be death or life imprisonment without possibility of parole. In determining the appropriate sentence, the jury is directed to take into account "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circusmtances found to be true . . ." (former Pen. Code, § 190.3, subd. (a)). Thus, particular special circumstances found to be true in the guilt phase become aggravating factors in the penalty phase. Because the jury is directed to take into account the existence of any special circumstances found to be true, the constitutionally mandated objective of focusing on the particularized circumstances of the crime and the defendant is undercut when the

defendant's conduct is artificially inflated by the multiple special circumstances based on an indivisible course of conduct having one principal criminal purpose.

The special circusmtances of burglary with intent to commit larceny and robbery involve conduct with the same underlying intent: to steal the property of the victim. (People v. Green, supra, 27 Cal.3d at p. 54.) The evidence in this case supports the conclusion that defendant and his companions travelled to Long Beach for the purpose of robbing the victims. In the course of that robbery, the defendant committed a burglary and two murders to facilitate the robbery. Under these facts, the robbery and burglary special circumstances are necessarily overlapping because they both describe virtually the same conduct. The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state "tailor and apply its law in a

manner that avoids the arbitrary and capricious infliction of the death penalty." (Godfrey v. Georgia (1980) 446 U.S. 420 at p. 428.) The United States Supreme Court requires that the capital-sentencing procedure must be one that "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." (Jurek v. Texas (1976) 428 U.S. 262, at pp. 273-274.) That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance.

This conclusion has been reached in other jurisdictions that have considered the propriety of charging "overlapping" special circumstance allegations to crimes involving the same conduct or intent. For example, in Provence v. State (Fla. 1976) 337 So.2d 783, cert. den. 431 U.S. 969 (1977), the Florida Supreme Court considered application of the two aggravating circumstances of

murder in the commission of a robbery (Fla. Stat. § 921.141(5)(d) and murder for pecuniary gain (Fla. Stat. § 921.141(5)(f)). In rejecting the contention that both aggravating factors could be applied to a murder committed in the commission of a robbery, the court explained that while "in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged." (357 So.2d at p. 786.)

Similarly, the Alabama Supreme Court has disallowed the use of both a capital felony committed during a robbery (Ala. Code, § 13-11-6(4)) and a capital felony

committed for pecuniary gain (Ala. Code, § 13-11-6(6)) as aggravating circumstances to a robbery-murder. The court held that in finding both aggravating circumstances, the trial judge "misconstrued the latter aggravating circumstance, in effect, condemning Cook twice for the same culpable act -- stealing money. Subsection 6 would, of course, cover a variety of crimes committed with the hope of financial benefit, ranging from 'murder-for-hire' to an heir 'killing his benefactor to gain his inheritance.' But we do not think it appropriate to apply this aggravating circumstance to situations already condemned under subsection 4 which by definition involve an attempt at pecuniary gain. Thus, to avoid repetition, subsection 6 should not be applied to a robbery." (Cook v. State (Ala. 1979) 369 So.2d 1251.

The North Carolina Supreme Court has similarly limited the use of the aggravating circumstances of "avoiding or preventing lawful arrest," and that the "capital felony was committed to disrupt

or hinder the lawful exercise of any governmental function or the enforcement of laws." That court held that submission to the jury of both aggravating circumstances on substantially the same evidence was improper, since it "amounted to an unnecessary duplication of the circumstancs enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant." (State v. Goodman (N.C. 1979) 257 S.E.2d 569, 587.)

These courts had a similar objective in limiting the use of overlapping aggravating circumstances -- to guide and focus the jury's "objective consideration of the particularized circumstances of the individual offense" (Jurek v. Texas, supra, 428 U.S. at p. 274) so as to avoid unnecessary and prejudicial inflation of aggravating circumstances based on one aspect of the defendant's crime.

In each case, the goal is the same, to provide particular standards so as to avoid the risk of arbitrary and capricious infliction of the death

penalty condemned by the United States Supreme Court.

The principles underlying California's prohibition of double punishment also support the conclusion that the charging of special circumstances should be limited in this case. Penal Code section 654[11/] has been construed so as to "limit punishment for multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in time, in those instances wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental." (People v. Beamon

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11/ Penal Code section 654 provides: "An act or omission which is made punishable in different way by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

(1973) 8 Cal.3d 625, 639.) In determining whether section 654 is applicable, the initial inquiry is to ascertain the defendant's objective and intent. (Id.) In this case, it is clear that defendant and his companions had but one principal objective. As we have noted, the evidence supports the conclusion that the acts underlying the special circumstances were committed during one indivisible course of conduct undertaken to further a principal criminal objective, the robbery of Mr. and Mrs. Crumb. To accomplish that objective, defendant and his companions entered the apartment of the victims, committed the robbery, and murdered the victims to avoid detection. Were this not a case involving special circumstances, the prohibition against double punishment would be clearly applicable. "A series of criminal acts with the objective of robbery which results in both a robbery and a murder . . . of the same victim is within the rule of Penal Code section 654." (People v. Lowe (1975) 45 Cal.App.3d 792,

735.)

The Attorney General argues that the finding of a special circumstance does not impose punishment, and therefore section 654 is inapplicable. In the words of the Attorney General, "[m]ultiple special circumstances have no greater effect than the finding of one special circumstance," because whether one or more special circumstances is found to be true, the effect is the same -- to trigger a penalty hearing. But the Attorney General underplays the dual role of the special circumstance allegations in a capital case. Special circumstance findings are used not only to determine whether a penalty hearing will be held, but also as an explicit factor for the jury to consider in the penalty phase. As we have stated, former Penal Code section 190.3 specifies that "[i]n determining the penalty the trier of fact shall take into account . . . the circumstances of the crime . . . and <u>the existence of any special circumstances found to be true</u> . . . ." Thus, the finding of more than one special

circumstances has crucial significance in the penalty phase. Unlike cases where the punishment for multiple convictions is limited by a stay of sentence on the less severe offenses, no such limitation is possible where the jury determines the sentence and is instructed to consider the existence of any special circumstances found to be true. Although the finding of a special circumstance does not in itself "impose punishment," such a finding has a direct effect on whether the jury imposes the utlimate punishment. It is in this respect that the finding of multiple special circumstances based on an indivisible course of conduct violates the prohibition of Penal Code section 654.[12/]

Having identified the problem created by charging multiple special

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12/ Because defendant committed crimes of violence against different victims, he can be charged with two murders each carrying a special circumstance allegation. (People v. Miller (1977) 18 Cal.3d 875, 885.)

circumstances, we must consider the appropriate procedure when defendant's single act or indivisible course of conduct constitutes separate substantive offenses which may form the basis for special circumstance allegations.

Several solutions have been suggested. First is the recommendation that in such cases the prosecution must make an election between the special circumstance allegations. Thus, in this case, the prosecution could charge either the burglary or robbery special circumstances, but not both. The prosecution, however, has the discretion to charge those offenses that are supported by the evidence, and it would be unfair to require that the prosecution guess which offense the jury will decide has been committed.

Another proposed solution is that in situations where the murder may have been committed during a burglary or robbery, the prosecution should charge those special circumstance allegations in the alternative. The prosecution may present evidence of either or both

special circumstances, but the jury may choose only one. But, the jury must determine whether defendant committed the substantive offenses underlying the special circumstance allegations, and since in noncapital cases the jury could find that defendant committed both substantive offenses, it would be inconsistent for the jury to pick one or the other of these special circumstances at the guilt phase while concluding that defendant committed both substantive offenses. Moreover, it would be difficult if not impossible to instruct the jury how to rationally decide which special circusmtance to choose.

We conclude that the appropriate procedure would be to allow the prosecution to charge those special circumstances supported by the evidence, and for the jury to determine in the guilt phase which special circumstances may have been committed.

Assuming that overlapping special circumstances charged are found to be true, the doctrine of "merger" and the prohibition against multiple

punishment should then operate in the penalty phase to prevent the improper cumulation of special circumstances to avoid the risk that a jury may give undue weight to the mere number of special circumstances found to be true. To avoid that risk, in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one. In addition, the prosecution should be barred from referring to those multiple special circumstance findings which have been merged in the penalty phase. Such a procedure is necessary because of the dual nature of special allegations provided by California's death penalty law coupled with the unique role of juries in determining the appropriate sentence in capital cases.

A similar problem is raised by the duplicative use of the "multiple murder"

special circumstance in this case. In addition to the burglary and robbery special circumstances, defendant was charged with the "multiple murder" special circumstance (former Pen. Code, § 190.2, subd. (c)(5)) for each murder count. The multiple murder special circumstance is applicable where defendant has in the present or in a prior proceeding been convicted of more than one offense of murder of the first or second degree. In this case, alleging this special circumstance with each murder count results in a finding of two special circumstances. Since there must be more than one murder to allege this special circumstance at all, alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty, a result also inconsistent with the constitutional requirement that the capital sentencing procedure guide and focus the jury's objective consideration of the particularized circumstances of the offense and the individual offender.

(Jurek v. Texas, supra, 428 U.S. at pp. 273-274.)

In our view, the appropriate charging papers would allege one "multiple murder" special circumstance separate from the individual murder counts. This procedure would properly guide the jury's objective consideration of the circumstances of the crime without hampering the prosecution's ability to seek what it considers to be the appropriate punishment.

7. Issues relating to the penalty phase: Exclusion of defendant's poetry at the penalty phase.

Defendant contends that, during the penalty phase of his trial, the court erred in excluding proffered evidence consisting of poetry written in appellant's handwriting that was relevant to mitigation. Respondent argues that the evidence was either irrevelant or was inadmissible hearsay. Respondent also contends that the evidence was cumulative and that its exclusion was not prejudicial.

The parties stipulated that the poetry was written by defendant while he

was in custody in Colorado and before he was charged in California. The poetry, along with defendant's other personal effects, was seized by Kansas authorities under a search warrant when defendant was extradicted to Kansas and was later obtained by defendant's counsel in discovery. During the penalty hearing, defendant's daughter testified that she and defendant had written poetry together while defendant lived with her, and that they exchanged poems by mail while he was in jail. Defendant then attempted to introduce the poetry written in Colorado to demonstrate another dimension of his character, so that the jury could see him as a unique individual.

(a) Relevance.

Under California law the prosecutor and the defendant may present evidence at the penalty phase relevant to aggravation and mitigation, including evidence of the defendant's character, background, history, and mental condition. (Pen.

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Code, § 190.3.)[13/] In addition, the federal Constitution requires that a defendant in a capital case be permitted to introduce any evidence relevant to his character or record as a mitigating factor. (Lockett v. Ohio (1978) 438 U.S. 586; Eddings v. Oklahoma (1982) 455 U.S. 104, 110-112; People v. Frierson, supra, 25 Cal.3d 142, 178.) In Lockett, the United States Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character of record and any of the circumstances of the offense that

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13/ Section 190.3 provides, in part: "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, . . . the defendant's character, background, history, mental condition and physical condition."

the defendant proffers as a basis for a sentence less than death." (438 U.S. at p. 604 [98 S.Ct. at p. 2964], fns. omitted, emphasis in original.)

In a capital case, the penalty jury "looks at the individual as a whole being and determines if he is fit to live." (People v. Morse (1964) 60 Cal.2d 631, 647.) The scope of admissible evidence as to the defendant's character and background must therefore be very broad. (See, e.g., People v. Nye (1969) 71 Cal.2d 356, 371-372, cert. den. 406 U.S. 972.) Defendant asserts that his poetry is the type of matter that the jury must be permitted to consider because it illustrates a particular aspect of his character which makes him unique.

(b) Hearsay.

Respondent argues that the poems cannot be relevant unless they are offered to prove that defendant believes the sentiments expressed in them. Respondent contends that, if the poems are offered for that purpose, they are hearsay and therefore inadmissible under

Evidence Code section 1200.[14] Defendant contends that the poems were not hearsay because they are not offered to prove the truth of the matters stated in them.

Although the trial judge ruled that the poems were not hearsay, he refused to admit them on a ground essentially equivalent to the rationale of the hearsay rule -- that they were offered as a means of testifying without submitting to cross-examination.[15] The judge was "troubled by the idea that [defendant]

14/ Section 1200 provides: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

"(b) Except as provided by law, hearsay evidence is inadmissible."

15/ Defendant's counsel offered to have defendant testify that he had written the poetry and testify as to where he had written it, but refused to allow the prosecutor to cross-examine on the content of the poetry.

wrote them, with litigation pending, and it's a way of testifying, without te: tifying, really." A defendant in a criminal case may not introduce hearsay evidence for the purpose of testifying while avoiding cross-examination. (People v. Williams (1973) 30 Cal.App.3d 502, 510.)

Respondent argues that the poems were written for use in court, with the intent to cummunicate to a jury the implied statement that the poems express defendant's true thoughts and feelings.[16/] The trial court, after

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16/ The proferred evidence consisted of seven pages of material in defendant's handwriting. The following excerpts illustrate their content:

". . . I know you're wondering/Why I called/ But does it matter, any at all/ That I still love you, need you, & want you/ Most of all/ I'm soooo sorry for the wrong I done"

". . . Why must we argue/ Why must we fight/ Cause after all/ We've seen the light/ We have each other/ We need no

reading the poems agreed, interpreting them as a "pitch for sympathy."

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other/ So let's not argue/ And let's not fight . . . ."

"The day we visited the Zoo/ They got cages/ For human beings too/ . . . So if & when my day arrives/ I might not want to go/ But one thing I can say for sure/ I won't have to worry/ About any of mankind/ Catching hell?/ Nor deal with/ Man's man made jails of hell?"

"So I regret to cry/ And surely we all/ Eventually die/ What ever has occurred/ In my day's & Time/ I feel sorrow for no wrongs/ And joyful for no rights/ I look at the things/ That have occurred to me/ As/ Pure destiny/ That was already planned before my time/ . . . ."

". . . I can't help but to feel, I have know [sic] pride/ Because in my heart/ I know I tried/ I have know [sic] one to answer to but myself/ But because I love & care for my family/ I must put their mind to rest/ When the man said I committed the crime/ I won't lie/ But the

Defendant's purpose in offering the poetry is not entirely clear. Defendant's counsel argued at trial that the poetry was being offered in mitigation because it "allows the jury to see a person's particular facets or aspects of an individual which makes him unique, which makes him human, which stands him apart from his fellow human beings . . . ." Use of the poetry to show that he believed the sentiments expressed in the poems would constitute hearsay evidence. On the other hand, use of the poems to illustrate only that he was a sensitive individual who expressed his feelings in poetry, regardless of its

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truth is/ That I was out enjoying myself/ Although some of these thing's you might find hard to believe/ Just remember this, just for me/ I sit in a cell/ Not knowing the limit of the time/ Just provide for the children give them love & treat them kind/ For one day I'll be coming home, it's just a matter of time/ I just hope I'll have a place in your arms? Everlasting mine."

content, would not make the evidence hearsay.

Even if the evidence is hearsay, there are two possible grounds for admitting it. First, defendant argues that the poems are admissible under the rule of Green v. Georgia (1979) 442 U.S. 95 [99 S.Ct. 2150]. In Green, the United States Supreme Court held that, in the punishment phase of a capital case, a defendant's proffered evidence must be admitted if it is highly relevant and substantial reasons exist to assume its reliability, despite the fact that the evidence is inadmissible hearsay under state law. (442 U.S. at p. 97 [99 S.Ct. at p. 2151].)

Second, the poems may come within the "mental state" exception to the hearsay rule. (Evid. Code, § 1250.)[17/]

17/ Section 1250 provides that: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental

Defendant does not raise this argument, but it seems clear that section 1250 could apply. If, as respondent argues, the poems were offered as evidence of defendant's true thoughts and feelings, they should be admissible under section 1250 unless they were written under cirucmstances indicating a lack of trustworthiness.

Both of these theories of admissibility require that the prop nent of the evidence show that the evidence is trustworthy or reliable. The comment to

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feeling, pain, or bodily health) is not made inadmisible by the hearsay rule when:

"(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action . . . ."

Section 1252 imposes a limitation: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

section 1252 explalins that "[i]f a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence." (Evid. Code, § 1252, Law Revision Com., Vol. No. 29B West's Ann. Evid. Code (1966 ed.) at p. 283.) Again, the question is whether defendant wrote the poetry for the purpose of communicating a statement to a jury. If so, the exceptions cannot apply.

The circumstances surrounding the writing of the poetry by defendant in his jail cell militates against the possibility of a motive to manufacture self-serving evidence. Defendant's daughter testified that she and defendant had written poetry together while defendant lived with her, and that they exchanged poetry by mail while defendant was in jail. The poetry was seized by authorities when defendant was extradited to Kansas. Defense counsel only obtained the poetry through the discovery process. These facts do not warrant a conclusion

that defendant wrote the poetry with a motive to manufacture evidence. We therefore conclude that substantial reasons exist to assume the reliability of the proferred poetry, and that the trial court erred in excluding it as mitigating evidence in the penalty phase of defendant's trial.

The judgment is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

BROUSSARD, J.

WE CONCUR:

Bird, C.J.
Reynoso, J.

C O P Y

PEOPLE V. LEE EDWARD HARRIS
Crim. 21633

CONCURRING OPINION BY GORDIN, J.

With reluctance I concur in the judgment for reversal. The reasons for my reluctance, and my concurrence, I explain below.

I agree with Justice Broussard's plurality opinion that the defendant should be deemed to have established a prima facie case that he was deprived of his right under federal and state Constitutions to a trial by an impartial jury drawn from a fair cross-section of the community. As the dissenters observe, there are gaps in defendant's statistical showing; but given the differences in resources available to a defendant and the state, and in light of published studies which point to the exclusive reliance upon voter registration lists as a likely source of racial and ethnic disparity in the

composition of the juries, I am prepared to say that defendant's showing should be regarded as sufficient to trigger further inquiry.[1/] It is about time, I think, that the problem be squarely confronted.

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1. I do not agree with all of the reasoning in the opinion on this point. In my view, a defendant who challenges jury selection procedures on the basis of population statistics can at least be expected to refine those statistics on the basis of readily available census information reflecting the relative percentages of majority and minority populations over the age of 18. It does not appear, however, that consideration of such data would be fatal to defendant's prima facie case. According to 1970 census data figures, for example, the percentage of blacks in the over-18 population (9.4 percent) was only slightly less than the percentage of blacks in the population as a whole (10.8 percent). (1970 Census of Population, vol. 1, Characteristics of the

Were it up to me, however, I would not reverse the judgment on that account. In the trial court, both parties were operating without clear appellate guidance as to the applicable ground rules. Relying upon the trial court's determination that defendant's statistics failed to establish a prima facie case, the People presented no rebuttal evidence. I believe that considerations

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Population, ch. B, General Population Characteristics (PC70-1-B6.) There may be merit also in the dissenters' view that the more appropriate focus for statistical analysis is the area within a 20-mile radius from the Long Beach Courthouse, but the People did not challenge the statistics on that ground and this court has been presented with no basis for taking judicial notice of the geographical distribution of racial and ethnic populations within Los Angeles County. If my view as to the appropriate disposition were to prevail (infra) that would be a matter of inquiry upon remand.

of fairness and judicial economy require that it should not have opportunity to do so. Rather than permit defendant's conviction to disappear in a factual vacuum, this court, on the authority of Penal code section 1260,[2/] should remand for further evidentiary proceedings.

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2. Section 1260 provides: "The court may reverse, affirm, or modify a judgment or order appealed from . . . and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." "[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand." (People v. Vanbuskirk (1976) 61 Cal.App.3d 395, 405; People v. Minor (1980) 104 Cal.App.3d 194, 200; see also People v. Brooks (1980) 26 Cal.3d 471, 493.)

Upon full consideration of relevant evidence it might be concluded that "no disparity of constitutional significance exists," or that "even with the use of multiple sources and all other practical means, a certain level of disparity is unavoidable," or that the under-representation which does exist is justified by a showing of overriding state interest. (Plurality opn., pp. ___ - ___.)* In any of those events, the conviction could be affirmed without the necessity for further proceedings.[3/]

If I were to insist upon the disposition I prefer, however, there would be no judgment of this court, since all three proposed dispositions are mutually exclusive and none would be supported by four justices. That,

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3. It does not appear that there exists any reversible error in the guilt phase of defendant's trial. I express no opinion as to whether there might be reversible error in the penalty phase.

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* Typed plurality opinion at pages 34-35.

obviously, is an intolerable result. Since my view of the case is fundamentally incompatible with the disposition proposed by the dissent, I reluctantly join in the reversal of the judgment below.[4/]

GRODIN, J.

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4. See Screws v. United States (1945) 325 U.S. 91, 134. Justice Rutledge, after setting forth his views favoring affirmance of the conviction, stated: "My convictions are as I have stated them. Were it possible for me to adhere to them in my vote, and for the Court at the same time to dispose of the cause, I would act accordingly. The Court, however, is divided in opinion. If each member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. My views concerning appropriate disposition are more nearly in accord with those

stated by Mr. Justice Douglas, in which three other members of the Court concur, than they are with the views of my dissenting brethren who favor outright reversal. Accordingly, in order that disposition may be made of this case, my vote has been cast to reverse the decision of the Court of Appeals and remand the cause to the District Court for further proceedings in accordance with the disposition required by the opinion of Mr. Justice Douglas."

C O P Y

PEOPLE V. LEE EDWARD HARRIS
Crim. 21633

I dissent.

If some counties choose to use lists other than the voters' registration for selection of jury panels certainly they may do so. But is a county constitutionally compelled to do so, and if it does not, should its omission be deemed justification for reversal of a conviction based on overwhelming evidence? Unlike the majority, I would answer those questions in the negative.

I pause at the outset to observe that the statistics upon which the defendant relies contain a major gap. Dr. Butler's survey revealed that 3.4 percent were Hispanic. He then takes a quantum leap to note that the estimated population figures for Los Angeles County -- including persons who are under 18 and those who are aliens, legal and illegal

-- are 15 to 17 percent Black and 33 percent Hispanic in 1980.

The leading cases on the subject of jury selection (e.g., Taylor v. Louisiana (1975) 419 U.S. 522; People v. Wheeler (1978) 22 Cal.3d 258) require that a defendant be provided trial by an impartial jury drawn from a representative cross-section of the community. Our code uses the term "area served by the court" (Code Civ. Proc., § 197), not the county in which the court is situated. It takes only a cursory knowledge of the demography of Southern Calfornia to realize that Long Beach courts serve an area completely distinct in population characteristics from the totality of Los Angeles County. Indeed, Long Beach is closer to the county seat of Orange County (21 miles) than it is to the county seat of Los Angeles (23 miles). The defendant has produced no statistics relating to the ethnic composition of the community or area that is Long Beach, or from the supervisorial district in which the city is located (see Code Civ. Proc., § 206a). Figures

for the entire County of Los Angeles are not only irrelevant but in this instance significantly deceptive.

On the more fundamental issue, I perceive no persuasive reason to prevent exclusive reliance on voters' registration lists. They are specifically authorized by Code of Civil Procedure section 204.7. These lists include persons who are citizens, of legal age, men and women; they are drawn from all economic strata, every occupation, all races, religions and political ideologies.

Citizens may become registered voters at no cost and regardless of their ethnicity or financial well-being. This can be said of no other available list. Telephone books? Installation and use of a telephone costs considerable money these days, and, in addition, generally only the so-called "head of the household" is identified. Automobile registration lists? Ownership of an automobile indicates a certain financial status, and here also, except in an affluent family, often only one owner per

household is listed. Bank records, credit card lists, department store accounts, welfare rolls? All of these are indicative of a certain economic statuts. Property tax rolls? Ownership of real property is limited to persons with resources. Income tax records? If the state were to permit their use, eliminated would be those whose income or exemptions required them to pay no tax.

There is even a $6 charge for one to obtain an identification card issued by the Department of Motor Vehicles pursuant to Vehicle Code section 13000 et seq., and $10 for a driver's license pursuant to Vehicle Code section 12800 et seq. The lists of such licensees and ID card holders shall be used by jury commissioners "to the extent that systems for producing jury lists can be practically modified, without significant cost" (Code Civ. Proc., § 204.7). There are two answers to the rejection of these lists in the instant case: first, there is no showing that in a large metropolitan area this can be done "practically" without duplication and

without significant cost; second, the lists do not represent a cross-section of the community, but only those persons with the initiative, motive and financial ability to apply for the licenses or identification cards, an effort considerably more complicated and costly than registering to vote. No statistics have been offered to indicate minorities are better represented on such lists than on voter registration lists, and there is good reason to believe they are not.

In short, any list one can suggest implies an elite status or a certain economic class and in most instances eliminates those of marginal or limited income. Only the voters' registration permits all citizens over 18 to be listed at no cost whatever and with a bare minimum of effort. Indeed prior to each election the two major political parties, and most minor parties, conduct vigorous drives to encourage citizens -- often minorities in particular -- to register, and county registrars enlist hundreds of solicitors to be available on street corners and in shopping centers for that

purpose.

Obviously citizens identified as being among the minorities cannot be coerced into exercising their civic duty to register and vote, but constant efforts are undertaken to persuade them to do so. Why minorities are said to be less interested than others in participating in the most important of the privileges of democracy is, if true, a mystery that requires more sociological and psychological study than can be undertaken with the superficial data offered in this case. In any event I suggest that any citizen -- whether in the majority or minority population -- who steadfastly ignores or avoids his simple civic city to register and vote would be likely to ignore or avoid his more onerous civic duty to serve on a jury. And if he were by some means identified and reluctantly compelled to perform jury service he would in all likelihood not be a conscientious juror, a circumstance that might adversely affect a criminal defendant's right to be tried by a serious and objective trier of

fact.

The majority opinion recites the evidence which overwhelmingly establishes this defendant's guilt. I would affirm the judgment.

MOSK, J.

I CONCUR:

*Richardson, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

C O P Y

PEOPLE v. HARRIS

Crim. 21633

DISSENTING OPINION BY KAUS, J.

I dissent from the majority's view that this defendant has made out a prima facie case of having been deprived of a fair cross-section of the community. I agree, however, that there was error at the penalty phase. Therefore, if the disposition were up to me, I would have to struggle with the issue of prejudice.

For what they are worth, I shall briefly state my views on the cross-section issue.

The issue is, undoubtedly, one whose time has come. This case, however, is a poor trigger, mainly for the reasons set forth in Justice Mosk's dissent: there is no showing that population figures for the whole of Los Angeles County are relevant with respect to a 20-mile radius

from Long Beach. The fact that the People may not have stressed that point in their argument is neither here nor there: if the ruling of the trial court that no prima facie case has been established is correct, it is immaterial on appeal whether the proper basis was urged by the prevailing party. (People v. Braeseke (1979) 25 Cal.3d 691, 700; E. L. White Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 511.)

There is one additional quarrel I have with the majority opinon: it seems that we should be looking at the original "contact pool," rather than the venire. It says that "[t]he panel which tried defendant was drawn from those jurors who appeared. The representative character of those jurors not of the original contact pool, is the proper basis for comparison with the county population figures." (Opn., p. 22.)

Perhaps all that the majority is saying is that the composition of the contact pool is not a necessary part of defendant's prima facie case. If so, I

agree: given a prima facie case, let the People got forward and prove that the contact pool which resulted from the voter registration lists was properly balanced. What troubles me, however, is that the majority seems to be saying more: that the composition of the contact pool is irrelevant. What if the contact pool had contained precisely the same percentages of Blacks and Hispanics as the population which Dr. Butler used as the basis of his testimony? Surely this would go a long way to vindicate voters' registration lists as a single source for prospective jurors, although it would, of course, make one wonder how all the Blacks and Hispanics got dropped between the first contact by the jury commissioner and the eventual assembly of the venires.

In any event, as a result of the majority opinion the People will at some time be put to the burden of justifying the single-source procedure used to select prosepctive jurors. This is probably all to the good. If the method is unconstitutional, it ought to be

flushed out. If it is not, the proof ought to settle at least this particular attack on the jury selection process.

KAUS, J.

PEOPLE V. LEE EDWARD HARRIS

Crim. 21633

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TRIAL COURT: Los Angeles County Superior Court

TRIAL JUDGE: Honorable D. Sterry Fagan

TRIAL COURT NUMBER: A 018568

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102

JUN 20 1984

I have this day filed Order

Re-HEARING DENIED
Mosk, J. & Kaus, J. OF THE OPINION THAT THE PETITION SHOUD BE GRANTED.

In re: Crim. No. 21633

PEOPLE

vs.

LEE EDWARD HARRIS

Respectfully,

Clerk

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

CRIM. No. 21633

THE PEOPLE,
Plaintiff
and Respondent,

vs.

Appeal
County Los Angeles
Superior Court No. A-018568

LEE EDWARD HARRIS,
Defendant
and Appellant.

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED AND DECREED BY THE Court that the judgment

of the Superior Court of the County of Los Angeles in the above-entitled cause, is hereby reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 20th day of April, 1984.

Witness my hand and the seal of the Court, this 21st day of June, 1984.

SEAL

LAURENCE P. GILL
Clerk

By ss _____
Deputy

Crim. No. 21633

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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PEOPLE

V.

LEE EDWARD HARRIS

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In order to correct a clerical error, the order filed June 20, 1984, in the above entitled appeal, is amended, nunc pro tunc, to include the following language: "The request for stay of remittitur is DENIED." (Kaufman v. Shain (1896) 111 Cal. 16, 19; Carter v. I.W. Silver Trucking Co. (1935) 4 Cal.2d 198, 204, 206.)

Bird

Chief Justice

"LONG BEACH, CALIFORNIA; TUESDAY, APRIL 22, 1980; 1:35 P. M. DEPARTMENT SOUTH C HON. D. STERRY FAGAN, JUDGE

(Appearances as heretofore noted.)

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"THE COURT: For the record, all parties and counsel are present.

"We come now to the jury challenge, I am ready to hear your arguments on that. Mr. Carroll [Defense Counsel], I think you carry the burden here.

"MR. CARROLL: Yes, Your Honor. Your Honor, we attempted to adduce evidence to support the proposition that the jury in the Long Beach Judicial District does not substantially comprise a fair cross section of the community in the Los Angeles -- in the County of Los Angeles. We have a countywide draw. Through the defendant's special exhibit and the testimony of Dr. Butler, we set out what we felt were criteria sufficiently similar to that called for as a juror in the Long Beach Judicial District, had those measured against the same criteria for the population at large in the

county, and attempted to show that there was substantial disparity between the two.

"It's our position that if we establish there is a large substantial difference, that difference amounting to a constitutionally cognizable difference, that that infirmity should be found to exist and that the Court must fashion a remedy. We have not attempted and don't believe the law requires us to set forth a solution to that dilemma similar to the busing circumstance in 1954. It is only necessary that we show a constitutional discrimination, not that the burden is on the defense to establish another system that cures the infirmity.

"Of course, every system designed to cure it is subject to attack and I am sure that the system that's currently in use, that of using the -- have registered voters' rolls also was designed to cure an earlier infirmity. And probably, if we go back far enough, the earlier use of property to determine a person's ability to sit on a jury was cured by the use of voters' rolls. It is now our contention

that society has become enlightened enough and that -- that the Constitution is going to upgrade the requirements one more notch and that it is now -- society is such now that the use of the voters' rolls, while not discriminative -- the application or the use of it is not being done in a method designed to discriminate, it has the effect of doing so.

"Dr. Butler set forth the various statistics he used, the ratio showing that the Mexican balance in Long Beach panel during the period within which it was measured was about 4 percent; that in the community at large, it is approximately 33 percent. He is using not '80 figures and these are approximates. That the black members of the panel of Long Beach constituted approximately 6 percent; in the community at large, they are between 15 and 17 percent; that the economic makeup of the Long Beach jurors was skewed in a higher rank. And I would refer the Court to page 4 and 5 of defense special exhibit, I believe it is, the thrust of which was

lower economic groups were underrepresented, higher economic groups were overrepresented. Further, with respect to education, on page 3, the implication is that the lower level education groups -- that's grade school and high school -- are underrepresented on Long Beach juries. The higher education, college education and above, are overrepresented. The final criteria he used was age and I think that is on page 6. That the younger, 20 and under are -- well, he even said 30 and under are underrepresented on the Long Beach juries, while the older portion of the population is overrepresented.

"The difficulty in establishing this motion is, number one, what are the exact criteria that qualify one to sit on the jury? What those are is the legislative ferment now. The courts are wrestling with who in fact is entitled to sit on a jury, whether handicapped persons, what type of handicapped, whether a person has to read or write English or not, is Spanish speaking. Is a person who doesn't speak English at all excluded

from a jury? Those various -- the confusion of those criteria make it difficult for the -- anyone attempting to challenge by way of a motion like this to understand exactly what the criteria are.

"It is is our contention that the community at large does not mirror the actual sitting jurors, it would seem to be incumbent upon us to know what the criteria for sitting jurors are and unfortunately it is not as precise as we would like. As a consequence of that, the exact -- we cannot measure precisely those same characteristics, whatever they might be in the community at large. Dr. Butler tells -- tells the Court he chose basically the same criteria that the U.S. Census Bureau used, breaking down the six categories, as I have just explained, and while there may be more precise ones, citizenship being one, that question is not used on the census bureau. He felt that it could be easily remedied by using an expanded juror selection list.

"They could simply be asked that question, Are you a citizen or not?, but

that is not one of the criteria that has been available either to the census or to Dr. Butler. I don't think that that should preclude the motion being granted, since it can be easily cured. We have no reason to believe that a person or that some persons have not falsely stated they are citizens and have basically misrepresented in a registering to vote. We do know -- and I think the Court can take notice -- periodically initiatives go around and they challenge 15 or 20 percent of those percent of the signatures on the basis that people have lied about being citizens. I am sure that if someone wants to misrepresent, they can, and the mere fact that a person has registered to vote and his name appears on that roll does not give rise to the legal conclusion they are a citizen, so I think, even that being the clearest criteria, it begins to break down when it is examined closely.

"We feel that the figures set forth by Dr. Butler, through the five months in 1979 and in January of 1980, do give a relatively accurate picture of the kinds

of jurors that are sitting in Long Beach. We feel that the statistics he has used in 1970, updated in 1975, and updated again through alternate source material through 1980, also give a fairly accurate picture of the cross section in the County of Los Angeles; that substantial disparities have been shown by those statistics. We believe those disparities have raised an issue of constitutional dimensions. I think it should be further noted that my client is a black man and it has particular -- has particular relevance to him, at least the portion of the study showing that black person are underrepresented by a substantial amount. What the consequences of that is is open to question, whether black persons would be -- what effect having a greater percent of black persons on the jury -- what conclusions that would lead to, I don't know. I think we only have to demonstrate that there is a disparity. And the Constitution calls for a fair cross section of the community, and that cross section, we believe, has been shown not to be fair.

"Whether these are valid criteria, whether the -- whether it can be argued a person has a constitutional right to a -- to undereducated people on a jury or young people, certainly the Constitution calls for it. It does begin to sound peculiar when you argue it, but I think our burden, as I say, is to establish that the disparity exists I think we have done that. And we would urge the Court to find that the panel from which this jury in this case is likely to be chosen does not adequately reflect the cross section of the community of the County of Los Angeles.

"THE COURT: All right, Mr. Seifert.

"MR. SEIFERT [PROSECUTOR]: All right. I must take issue with the basic foundation upon which the defense, if you will, house of cards is built in that the defendant would argue apparently that he and his witnesses and evidence have made out a prima facie case of discrimination. I suggest the evidence is not conducive to that conclusion and does not lead to that conclusion because the nature of the evidence itself, as I attempted to focus,

at least in part on the cross-examination of Dr. Butler, shows this Court, I think, clearly that his figures and facts are as speculative as his conclusion that all Spanish-surnamed persons in California are citizens. Such a preposterous statement and assumption by a demographer, whose sworn obligation as a witness is to present reliable information to this Court, flies in the face of reason and shows that Dr. Butler is closing his eyes to certain realities that everyone in this community is confronting. And that is the great deal of influx of illegal aliens of Spanish descent into our community, which is a large problem, not one that can be ignored by the mere assumption that all Spanish-surnamed persons are citizens for purposes of his statistics.

"His evidence that he presents is also speculative in that it does not get to the heart of the matter. The Supreme Court of the United States has never indicated to this day that a jury venire must mirror the ethnic balance, if you will, in the community but merely has

indicated that it must reflect a fair cross section. That's totally different than a mirror. And the California Supreme Court and the appellate courts in California have consistently held that a review of the demographic makeup of the people in the community cannot be taken from the people as a whole but must reflect the eligible jurors in the community and how they stack up against the jury venire. And particularly in the case of Adams vs. Superior Court, 27 Cal.App.3d 719, the Court discusses the difference between a challenge of discrimination versus statistics from the entire community versus a more reliable challenge based on the statistics reflecting the makeup of the eligible jury or juror population. And the Court concludes clearly that a much greater disparity between the population as a whole and the jury venire will be permitted because it is assumed that there are many more people that are eligible for jury service. And all of the questions on cross-examination that I attempted to get answers to from

Dr. Butler focused on the very fundamental issues, does his survey or any survey he is aware of focus on the eligible juror population as the measure against which we compare the jury venire? And the answer was a resounding no in that Dr. Butler concluded that there was no available source material to determine eligible juror population, but he did concede that the only possible source of statistical information that would lead to likely eligible jurors was the list of registered voters, which both statutorily is called for as the basis for the jury venire in the Code of Civil Procedure, Section 214, and also that defines the qualifications for jurors and, further, that has been approved as the single source of jurors and is constitutional under the following cases: People vs. Sirhan, 7 Cal.3d 710; People v. Waw, W-a-w, 74 Cal.App.3d 633; People vs. Cabral, C-a-b-r-a-l, 51 Cal.App.3d, page 707; People vs. Breckenridge, 52 Cal.App.3d 913; and People vs. Newton, N-e-w-t-o-n, at 8 Cal.App.3d 359. All of those cases have concluded that the

statutory permission to use the jury list as the single source of jurors is constitutionally valid.

"I think the prime point by the defense is it is premature in many aspects and speculative in many. It is speculative in the updating of a ten-year-old census, which is not reliable in the first place as a factual basis upon which to conclude the present population makeup, and further it is speculative in that it doesn't divide its inquiry into looking at the eligible juror population verus the many, many ineligible aliens, the many, many people who do not speak English, the many, many people who are infirm or unqualified as jurors for other reasons, for many, many people who have been convicted of felonies and would not be eligible for jury service, and all of the other persons who, for other reasons, would not be eligible for jury service. So in looking at the population as a whole, we get an unfair and a distorted picture as to who could be a juror, if they wanted to, and I suggest that the evidence of

the defense is largely speculative because of that particular area of their inquiry, looking at the population as a whole.

"I don't think, and I think the Court will be forced to agree, in reviewing the evidence submitted by virtue of these various documents that the defense has made out a prima facie case of that type of invidious discrimination that is required in the Supreme Court cases cited before the system of selection of jurors, either grand jurors or petit jurors, is thrown out as unconstitutional and discriminating. I will quote from Taylor vs. Louisiana, at 419 U.S. 522. The law edition cite is 42 Law Edition 2d 690. And the law says there at page 702 of the law edition report, and I quote, 'The fair cross section principle must have much leeway in application. The states remain free to prescribe relevant qualifications for their jurors and to provide reasonable qualifications for their jurors and to provide reasonable exemptions, so long as it may be fairly said that the jury lists or panels are

representative of the community.'

"We have the evidence of the defendant's own expert, who, in his opinion, stated in answer to three separate questions on cross-examination that he assumes that the juror rolls, particularly those in Long Beach, are comprised of a fair cross section of the registered voters in the community. He cannot point to any discrimination by virtue of any invidious criteria such as race, creed, color, sex, age, income or any other criteria that indicates to him that jurors are excluded because of any of those reasons. He's told us, and the evidence submitted by stipulation also substantiates, that jurors are chosen completely at random, without regard to any illegal criteria and are only excused upon a showing of good cause that they must bring forward, not automatically excused, as was the case in Duren vs. Missouri, cited in the various papers presented to Your Honor.

"We have a situation here where the People of the State of California and all public agencies are making a

conscientious effort to draw more and more people into those rolls of registered voters. It is quite clear that there is an ongoing public relations campaign to get everyone who is eligible to vote to get out and do so, to make themselves a party of the system, if you will, to get them involved in the processes of government and particularly jury service and voting.

"It would appear then that the basic challenge, if there is one, that counsel, through his witnesses, is pointing to is that our law discriminates against undregistered voters, if anything, because those are the people or all of those people who are unregistered voters are not brought into the jury venire selection pool. And in order to establish that this is of constitutional dimension, it is required under the cases of Castaneda vs. Partida, and all of the other cases cited to the Court in the submitted documents, that the discrimination must be against, quote, a cognizable group, unquote.

"Adams vs. Superior Court, which is

controlling in this particular case, states, and I will quote -- I am sorry. It is People vs. Sirhan, at 7 Cal.3d 710. The California Supreme Court has stated that those who do not choose to register to vote cannot be considered a cognizable group within the meaning of those cases cited. And that is at page 750 of the court's opinion, which begins at page 710. So if the statistics, if the testimony of Dr. Butler has any meaning at all, what he is telling us is we are not including within the jury venire people who are not registered voters. The California Supreme Court tells us that is not a congizable group within the constitutional definition of that phrase by the U.S. Supreme Court. Further, the statistics are meaningless, since they don't cover the eligible juror population, as compared to all people physically located in the, quote, community, end of quote. I think counsel's evidence and all that submitted falls short of a viable challenge to our system. And the fact of the system changing, according to Dr. Butler, to

include DMV registrants in the pool does not render this system today violative of the constitutional protection of this defendant to a fair trial by a jury that's a representative cross section of the community. And the evidence would be apparently, according to Dr. Butler, that the jury does represent an eligible cross section of the community in that the eligible jurors are chosen from the registered voters who are all required to be citizens and otherwise apparently eligible for jury service under the definitions. I submit it.

"MR. CARROLL: Your Honor, briefly, I think the People are just wrong here and know it. If this trial were being held in San Francisco and Alameda or San Diego County, my client would have the opportunity to have an expanded group from which the jury is selected. The County of Los Angeles is in fact -- in fact in the process to use driver's licenses. Some other counties use welfare rolls, dog license rolls. You could use any kind of expanded source list you choose and it would be clear you

would have a wider pool from which to draw. What is peculiar, to my lights is one does not have to be a registered voter in order to qualify to sit on the jury, except for the fact that the Constitution of the State of California argues that that has to be one of the source lists. It's puzzling to me in an era where less and less people register to vote, where we should argue that this should continue to constitute the only base upon which a person can have their name considered to be -- their name considered for use in sitting on a jury. It's simply an absurd criteria.

"Now, there are much better criteria that give a more expanded basis from which to draw, and the People have harped on the fact that there are illegal Mexican immigrants in this country. Obviously they are never going to come forward and we will never be able to document how many they are. They have used that impossible burden to deny my client the opportunity of having a fair cross section. Further, I have heard no challenge to the fact that the black

population in Los Angeles County is -- or any portion of it is unlawfully in this country. And the statistics clearly show they are underrepresented on the Long Beach juries by -- well, 17 percent, according to Dr. Butler's figure. And in the community -- and there are only 6 percent in Long Beach juries, so I think that is substantial. And I don't think that the statistics with respect to Mexicans -- that red herring should apply to the key issue in this case.

"I think the discrimination, while not intended, does exist. It has been acknowledged by other jurisdictions in this state. By implication, it is acknowledged in Los Angeles and is in the process of being remedied. As I say, I don't feel that we have the burden of fashioning the remedy here. That is going to be up to the powers that be in Los Angeles, but I think it is fatuous to argue that the discrimination does not exist.

"THE COURT: All right, Thank you, gentlemen. The problem here is easy to recognize and define. The solution to

to the problem is not nearly that easy. As I see it, the use of a single-source method of creating a prospective jury panel has created a problem because of the failure of certain members of the citizenry to register to vote. This then, according to the evidence presented, may tend to create a bias in terms of age or ethnicity. Certainly the statistical studies from the United States Census in 1970 and the government projections show that Blacks and Hispanics are underrepresented on juries because of failure on their part, for one reason or another, to register to vote.

"It is then suggested from that fact that because of these registration habits and trends that the voter registration produces a biased jury list for reasons that are on grounds I have already mentioned. And, moreover, that the bias becomes more acute since the 1970 United States census, due in large part to an increasing minority voting apathy.

"Now, at the very outset, I think that we should recognize that a legion of California cases to which Mr. Seifert has

already alluded have sustained and upheld the procedure of compiling prospective jurors from the voters' register and so have federal cases, among them United States vs. Dangler, 422 Fed 2d 344. That's D-a-n-g-l-e-r.

"Turning to the statistical information on which the defense relies, I feel that that is subject to some question. Even the expert brought forth by the defense acknowledged that the figures for the 1970 census were not accurate, and between 1970 and 1975, they were inaccurate, and from these inaccurate figures, he drew an assumption that that Spanish-surnamed people were underrepresented. I don't know from where he drew that assumption, but if the original premise is wrong, then all of the theories must fall; moreover, the raw census figures and other statistical data represent numbers of people, rather than qualified jurors. And finally, the study made of the Long Beach jury panel was conducted for a period from May to August of 1979, which seems to me to be a rather short period of time within which to draw

any positive conclusions.

"The 1980 census, recently taken, will undoubtedly give more accurate information upon which one can determine what various percentages of different ethnic groups and economic groups, age groups constitute a fair cross section of the community. At least, if those people who urged to fill out the census do in fact comply with that request.

"On the subject of using multiple lists, I think you are going to get into a problem, creating as many problems as you solve; for example, if you use a DMV list in conjunction with the voters' registration list, there are certain people who are excluded from obtaining a driver's license. One that occurs to me immediately is elderly people, who don't qualify to get a driver's license. The other problem that immediately occurs to me in terms of using multiple lists is the problem of duplication of names. So if John Jones gets on the list twice, then he has much more chance of being ultimately selected as a trial juror than someone who is only named just once, but

as you have recognized, I am not here to try to solve the problem today but merely to determine if the present panel is constitutionally acceptable. In short, it is my feeling that the evidence presented has demonstrared that there may be a better way to create a master list of prospective jurors that would provide a better mirror image of the community. Hopefully community involvement in jury duty would inspire some of our citizens to take an affirmative role in their government; however, based upon the showing made here, the Court is of the opinion that the present jury selection is constitutionally adequate; therefore, I will deny your motion to challenge the panel." (R.T. pp. 428-442; emphasis added.)

SUPREME COURT OF THE UNITED STATES

No. A-19

CALIFORNIA v. LEE EDWARD HARRIS

ON APPLICATION FOR STAY

[July 23, 1984]

JUSTICE REHNQUIST, Circuit Justice.

The State of California requests that I stay, pending action by this Court on its petition for certiorari, a judgment of the Supreme Court of California that reversed the capital murder conviction of respondent. The State wishes this Court to review the holding of the California court that the jury that tried respondent was not "drawn from a fair cross section of the community" as that phrase is used in Duren v. Missouri, 439 U.S. 357 (1979), and other cases.

Respondent was tried in Los Angeles County, which at that time the jury in his

case was empaneled summoned jurors by use of a voter registration list. The majority of the Supreme Court of California decided that respondent had produced credible evidence of substantial disparity between the representation of Blacks and Hispanics on the voter lists, on the one hand, and their representation in the population at large, on the other. That court also concluded that the State had failed to rebut this evidence.

The State contends that the Supreme Court of California has misapplied this Court's Duren decision so as to find a violation of the jury cross-section requirement where there is merely underrepresentation of a congizable class because of the failure of class members to register to vote. If I thought this issue was squarely presentd by the State's application, I would grant a stay, because I think four Members of our Court would probably vote to grant certiorari to review the issue and, with California's rule requiring retrial in 60 days, the case would become moot without a stay. Whether this sort of jury

selection procedure can be described as "systematically" excluding classes that do not register to vote in proportion to their numbers, and whether the need for efficient jury selection may not justify resort to such neutral lists as voter registration rolls even though they do not perfectly reflect population, see 439 U.S. at 368-370, are by no means open and shut questions under Duren.

The plurality opinion of the Supreme Court of California, however, says in substance that the State failed to preserve the second of these two questions in defending against respondent's appeal. The concurring opinion in that court, on the other hand, indicates a disagreement with this view. While I cannot at this stage of the proceedings determine even to my own satisfaction which is the correct view of California law, I think this procedural snarl is likely to deter some Members of this Court who would wish to review the substantive issues involved in this case from voting to grant certiorari. While there appears to be no such procedural

objection to the first of these two questions, I am doubtful that the "systematic" underrepresentation issue alone would attract enough votes to grant certiorari.

The State's application is accordingly denied.

CRIM. 21633

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LEE EDWARD HARRIS,

Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY

HONORABLE D. STERRY FAGAN, JUDGE

PETITION FOR REHEARING

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[Table of Authorities omitted.]

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v.	)	
LEE EDWARD HARRIS, Defendant and Appellant.	)	

PETITION FOR REHEARING

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The People of the State of California respectfully petition this Honorable Court for a rehearing in the above entitled case, the decision herein having been filed on April 20, 1984.

GROUNDS FOR REHEARING

It is respectfully requested this court reconsider its decision in this case for the following reasons:

1. The majority of this court has misconstrued and misapplied the requirements of Duren v. Missouri (1979) 439 U.S. 357 in holding appellant established a prima facie case of under-representation of Blacks and Hispanics at the Long Beach courthouse.

A. In holding that appellant met the second prong of Duren, a majority of this court totally ignored the area within a 20-mile radius of the Long Beach courthouse.

B. The majority has improperly concluded that once appellant satisfied the first and second requirements of Duren (i.e., underrepresentation of Blacks and Hispanics at the Long Beach courthouse) the third requirement of systematic exclusion of the group in the jury selection process was automatically satisfied regardless of the system used and without any examination of the

particular system.

2. Assuming arguendo appellant established a prima facie case that he was deprived of his right to a trial by an impartial jury drawn from a fair cross-section of the community, the proper remedy is to remand the case to the trial court, as Justice Grodin suggests in his concurring opinion, for an evidentiary hearing to allow the People to present rebuttal evidence, and thus avert the necessity of a retrial.

* * * * * *

ARGUMENT

[Argument I has been omitted.]

II

ASSUMING ARGUENDO APPELLANT ESTABLISHED A PRIMA FACIE CASE THAT HE WAS DEPRIVED OF HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY, THE PROPER REMEDY IS, AS JUSTICE GRODIN SUGGESTS IN HIS CONCURRING OPINION, TO REMAND THE CASE TO THE TRIAL COURT FOR AN EVIDENTIARY HEARING TO ALLOW THE PEOPLE THE OPPORTUNITY TO PRESENT REBUTTAL EVIDENCE, AND THUS AVERT THE NECESSITY OF A RETRIAL

A majority of this court reversed a judgment of conviction imposing a penalty of death for two first degree murder convictions on the ground that use only of the voter registration list deprived appellant of his right to an impartial

jury drawn from a representative cross-section of the community. The majority concluded that appellant established a prima facie case of under-representation of Blacks and Hispanics on the jury venires at the Long Beach courthouse due to the systematic exclusion of Blacks and Hispanics in the jury selection process (i.e., use of voter registration list) thus shifting the burden to the prosecution to show no underrepresentation existed or to justify the underrepresentation. Since the prosecution offered no rebuttal evidence in trial court, the majority concluded that the judgment of conviction must be reversed. (Slip Opn pp. 16-36.)

Justice Grodin, however, the "reluctant" fourth member of the four justice majority, wrote a separate concurring opinion in which he indicated that the proper remedy in this case was not a reversal of the judgment of conviction but rather a remand to the trial court for further evidentiary proceedings to allow the People the opportunity to present rebuttal evidence.

(Grodin, Conc. Opn. pp. 2-3.) Justice Grodin only joined in the reversal of the judgment because his view of the case was "fundamentally incompatable with the disposition proposed by the dissent." (Grodin, Conc. Opn. pp. 4-5.)

Assuming arguendo appellant established a prima facie case that he was deprived of his right to a trial by an impartial jury drawn from a fair cross section of the community, respondent believes the proper remedy in this case is, as Justice Grodin indicates in his concurring opinion, to remand the case to the trial court for an evidentiary hearing to allow the People the opportunity to present rebuttal evidence. Such a procedure would be in the interest of judicial economy and fair to all parties. It would also "squarely confront" the problem, as Justice Grodin suggests should be done, and determine whether the use only of the voter registration list as the single source is, in fact, unconstitutional and "ought to be flushed out" as suggested by Justice Kaus in his dissenting opinion.

In this case there is simply no valid reason for reversing the judgment of conviction where the issue -- whose time has come according to the concurring opinion of Justice Grodin and the dissenting opinion of Justice Kaus -- can be resolved by an evidentiary hearing in the trial court. Thus, this case can serve as the vehicle, resolve the issue and prevent postponement of the inevitable. Thus, respondent urges all members of this court -- those in the majority as well as the dissenters -- to grant a rehearing and reconsider the remedy of remanding the case to the trial court for an evidentiary hearing.

It is clear that this Court has the power to remand a case for a limited new hearing to avert the necessity of a retrial. In People v. Vanbuskirk, 61 Cal.App.3d 395, 405, Justice Kaus stated for Division Five of the Second District:

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"Section 1260[1/] of the Penal Code, . . . was amended by the 1970 Legislature . . . . While the added language merely recognizes a power appellate courts have always had and exercised, it does evidence legislative concern with unnecessary

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1. Penal Code section 1260 provides:

"The Court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." (Emphasis showing language added by amendment in 1970, Stats. 1970, c. 850, p. 1586, §1.)

retrials where something less drastic will do. Thus, in People v. MacDonald 27 Cal.App.3d 508, 511-512 (103 Cal. Rptr. 720), an otherwise faultless conviction was remanded for the sole purpose of resolving a speedy trial problem. [Accord, People v. Simpson 30 Cal.App.3d 177, 186.] In In re Wells, 20 Cal.App.3d 640, 651, the Court of Appeal remanded the matter to the trial court for the sole purpose of taking evidence concerning the constitutionality of the composition of the grand jury that had indicted the defendants. (Cf. United States v. Wade 388 U.S. 218, 242 [18 L.Ed.2d 1149, 1166]; Jackson v. Denno 378 U.S. 368, 395-396 [12 L.Ed.2d 908, 926-927].) What we gather from these authorities is that when the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury such an issue can be determined at a separate post-judgment hearing

and if at such hearing the issue is resolved in favor of the People, the conviction may stand."

Thus, where the trial court failed to determine properly the question of the fairness of a photographic lineup, the Vanbuskirk court remanded for a limited new hearing on this issue alone, and avoided the expense and delay of a new trial.

There is no question this Court has power to remand for a limited hearing to allow the People the opportunity to present rebuttal evidence to appellant's prima facie case of underrepresentation. Penal Code section 1260, describing the powers of the appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

As Witkin has noted, this 1970 amendment "which recongizes the power appellate courts have always had and exercised, also evidences legislative concern with unnecessary retrials where something less drastic will do." (Witkin, Cal.Crim. Procedure (1978 Supp.)

§ 726, p. 1035.) As noted in "Review of Selection 1970 California Legislation," (2 Pac. L.J., p. 386 (1971)) the purpose of the amendment "is to avoid the unnecessary expense of an entire new trial where the hearing need be only on a limited issue."

The remand power has been liberally exercised by the Courts of Appeal. In 1971, Division Four of the First Appellate District directed a remand for the limited purpose of determining whether a challenge to the grand jury composition was valid. In taking this action the court cited Penal Code section 1260. (In re Wells, 20 Cal.App.3d 640, 651.) Division Five of the Second District ordered a remand on a speedy trial issue in People v. MacDonald, supra, 27 Cal.App.3d 511, appeal after remand at 36 Cal.App.3d 103. In People v. Simpson, 30 Cal.App.3d 177, 186 the Fourth District, Division Two, ordered a remand to determine the issue of prejudice in connection with a claim of denial of a speedy trial. In People v. Anderson, 59 Cal.App.3d 831, 841-845,

the Fifth Distri t remanded the case for a new hearing limited to the propriety of the prosecution's destruction of evidence as required by the California Supreme Court in People v. Hitch, 12 Cal.3d 641, 647, 655. In People v. Ingram, 87 Cal.App.3d 832, the case was remanded to the trial court for the purpose of holding an in camera hearing on the issue of the disclosure of the identity of an informant. (Also see People v. Blouin, 80 Cal.App.3d 269.) In People v. Cropper, 89 Cal.App.3d 716, Division Three of the Second Appellate District remanded a case to the trial court for resentencing after the appellate court determined appellant's trial counsel was ineffective at the probation and sentencing hearing because he agreed with the probation officer's report that probation be denied. (People v. Cropper, supra, 89 Cal.App.3d at pp. 719-721.) In People v. Minor, 104 Cal.App.3d 194 it was held proper to remand to the trial court for a hearing after the Court of Appeal found error under People v. Marsden, 2 Cal.3d 118 in the trial

court's failure to inquire into a defendant's reasons for requesting the appointment of different counsel. And in People v. Coyer, 142 Cal.App.3d 839 it was held proper to remand to the trial court to hold a hearing to cure a discovery error.

From a review of these cases it is clear that this Court has the power to remand this case to the trial court for a limited hearing on the issue of allowing the People to present rebuttal evidence to appellant's prima facie case of underrepresentation. On remand, if the trial court finds, based on the evidence, that no disparity of constitutional magnitude exists, or that even with multiple sources and other practical means of certain level of disparity is unavoidable or the underrepresentation is justified by a showing of overriding state interest, the judgment of conviction should be affirmed without the necessity of further proceedings. A retrial is only necessary in the even the trial court finds the prosecution has failed to rebut appellant's prima facie

showing of underrepresentation of Blacks and Hispanics at the Long Beach courthouse.

The proposed remand is abundantly supported by statute and case authority. It will also serve both the People and the defendant's interest in having a timely resolution of this criminal proceeding without the expense and delay of a new trial. It will also resolve an issue "whose time has come" rather than postponing the inevitable to another day.

CONCLUSION

For the foregoing reasons, respondent respectfully requests a hearing be granted in this case.

Respectfully submitted,

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CAROL WENDELIN POLLACK,
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JRG:cb
LA81DA0347
4-30-84

Section 187 of the California Penal Code reads:

"Murder defined; death of fetus

"(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

"(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

"(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

"(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

"(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

"(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law."

Former sections 190.2 subd. (c)(3)(i), (c)(3)(v) and (c)(5) of the California Penal code reads:

"Death penalty or life imprisonment without parole; special circumstances

"The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

" . . . .

"(c) The defendant was personally

present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

" . . . .

"(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

"(i) Robbery, in violation of Section 211;

" . . . .

"(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

"(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which

if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree."

Section 211 of the California Penal Code reads:

"Definition

"Robbery defined. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force of fear."

Section 459 of the California Penal Code reads:

"Definition

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, as defined

in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not."

Section 1239 of the California Penal Code reads:

"Manner of taking appeal; automatic appeal from death judgment; duties of counsel

"Text of section operative until January 1, 1989.

"(a) Where an appeal lies on behalf of the defendant or the people, it may be

taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council.

"(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel. The defendant's trial counsel, whether retained by the defendant or court-appointed, shall continue to represent the defendant until completing the additional duties set forth in paragraph (1) of subdivision (b) of Section 1240.1."

Section 197 of the California Code of Civil Procedure reads:

"[Selection]

"It is the policy of the State of California that all persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court, and that all qualified persons

have the opportunity, in accordance with this chapter to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose. This chapter applies to all trial juries in all civil and criminal proceedings in all courts."

Section 203 of the California Code of Civil Procedure reads:

"[Manner of selection]

"Each court shall adopt rules supplementary to such rules as may be adopted by the Judicial Council, governing the selection of persons to be listed as available for service as trial jurors. The persons so listed shall be fairly representative of the population in the area served by the court, and shall be selected upon a random basis. Such rules shall govern the duties of the court and its attaches in the production and use of the juror lists. In counties with more than one court location, the rules shall reasonably minimize the

distance traveled by jurors. In addition, in the County of Los Angeles no juror shall be required to serve at a distance greater than 20 miles from his or her residence."

Section 204.7 of the California Code of Civil Procedure reads:

"[Source lists]

"(a) Source lists of jurors shall identify persons who reside in the county, and who are 18 years of age or older, shall include those who are registered voters, and to the extent that such systems for producing jury lists can be practically modified, without significant cost, shall also include those whose names appear on a list of licensed drivers or identification cardholders provided by the Department of Motor Vehicles pursuant to subdivision (b). Qualified jury lists and master jury lists derived from the source lists shall be prepared so as to reasonably minimize duplication of names.

"(b) Upon written request by the jury commissioner of a county, the Director of Motor Vehicles shall furnish the current source lists of the names and addresses of persons residing in the county who are age 18 years or older and are holders of a current driver's license or identification card issued pursuant to Article 3 (commencing with Section 12800) and Article 5 (commencing with Section 13000) of Chapter 1 of Division 6 of the Vehicle Code. The conditions under which such lists shall be compiled semiannually shall be determined by the director. This service shall be provided by the Department of Motor Vehicles pursuant to Section 1812 of the Vehicle Code. The jury commissioner shall not disclose the information furnished by the Department of Motor Vehicles pursuant to this section to any person, organization, or agency for any use other than the selection of trial jurors."

Section 206 of the California Code of Civil Procedure reads:

"[Selection of names]

"The names for the qualified jury list shall be selected from the different judicial districts of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making the lists. The qualified jury list shall be kept separate and distinct from the grand jury list."

(3)

[redacted]

LEE EDWARD [redacted]

On Petition for a [redacted]

to [redacted]

[redacted]

RESPONDENT'S BRIEF [redacted]

MOTION TO PROCEED [redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-265

STATE OF CALIFORNIA,

Petitioner,

v.

LEE EDWARD HARRIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of California

RESPONDENT'S BRIEF IN OPPOSITION and MOTION TO PROCEED IN FORMA PAUPERIS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-265

STATE OF CALIFORNIA,

Petitioner,

v.

LEE EDWARD HARRIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

There are at least four reasons why certiorari should be denied in this case. First, and probably most critical, is the fragmented and incomplete record which does not lend itself to an intelligent discussion of the Sixth Amendment issues. The record is replete with "procedural snarls" and "evidentiary gaps" because the State abdicated its responsibility to come forward with controverting evidence. Petitioner waived its opportunity to present evidence, not because of any reliance on the trial court's ruling (as suggested in the Petition for Certiorari), but because of a prosecutor's myopic and misinformed reading of existent law.

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Second, this case is fundamentally about state evidence law. The California Supreme Court reacted to a a one-sided and incomplete record with a decision on the law of evidentiary burdens. The court's opinion is important not to Sixth Amendment scholars, but to California lawyers concerned with when the burden of going forward with the evidence shifts from one party to the other.

Third, this Court's jurisdiction under 28 USC § 1257 is questionable since the federal rights asserted in the petition were never "raised, preserved, or passed upon in the state courts below." The request for an evidentiary remand was not made until the petition for rehearing. Even then it was argued as a question of statutory law. Petitioner never informed the state court that federal rights were at stake.

Fourth, respondent is scheduled to appear for trial on September 20. His jury will then be chosen from multiple lists according to a new statute which specifically remedies the challenge made below.[1/]

In short, this case does not present the Sixth Amendment issues "in a manner that warrants the exercise of the certiorari jurisdiction of this Court." (Murel v. Baltimore City Criminal Court (1972) 407 U.S. 355, 357, 32 L.E.2d 791.)

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1. California Code of Civil Procedure section 204.7 has been amended to provide for the selection of jurors from registered voter and motor vehicle lists when the latter can be added without significant cost. The statute is reproduced in the appendix to this brief at page 20.

1. Petitioner Waived Presentation of Rebuttal Evidence

Petitioner paints a picture of the State lulled into not presenting rebuttal evidence by reliance on the trial court's ruling that respondent had not made a prima facie case, and then being "blind-sided" by a revolutionary California Supreme Court which radically departed from "all existing authority." (Pet. Cert. pp. 22, 24.) This portrait bears little resemblance to the record.

Petitioner never intended to meet respondent's case with evidence. From the very beginning the prosecutor saw this as a settled legal matter, rather than an open evidentiary question. Through a misreading of California law he believed that the selection of jurors solely from voter registration lists was constitutionally valid no matter what evidence might be presented. "The People's position is quite simple," he told the court, the selection of jurors from voter registration lists "satisfies the law."

The prosecutor was willing "to stipulate to any evidence [respondent] wishes to present regarding demography, population, ethnic variances . . . [because] once the evidence that the juror rolls are drawn at random from registered voters is before the Court, that that will . . . satisfy the law as the People believe it exists under certain cases that I will cite to the Court . . . ."

The California Supreme Court opinion in the Sirhan case, according to the prosecutor, was "controlling in this

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case," and established that the selection of jurors solely from registered voter lists was constitutional per se.[2/]

Relying on this mistaken reading of Sirhan the prosecutor was content to quibble with respondent's evidence -- the census data was too old, the surveys were not long enough, disparities were not calculated correctly and total population figures had to be reduced to sets of jury eligibles.[3/]

Petitioner offered no evidence that respondent's data was inaccurate. Petitioner presented no evidence that the statistical refinements it wanted would make any constitutional difference. Petitioner offered no testimony suggesting that the disparities respondent proved were caused by something other than the jury selection system itself. And petitioner presented no evidence of any compelling state interest that would justify these disparities.

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2. People v. Sirhan (1972) 7 Cal.3d 710, 102 Cal.Rptr. 385. The prosecutor's opening and closing arguments are appended hereto at pp. 13-18.

3. For some unarticulated reason, both sides tried the case on the assumption that the jury had to be representative of the entire country rather than of a 20 mile radius around the courthouse which may be the California law. (See People v. Harris (1984) 36 Cal.3d 36, 48 and Code of Civ. Proc., § 203, reproduced below at page 20.)

2. The Opinion Below Deals With Matters of State Procedure

On appeal to the California Supreme Court, petitioner continued to argue that the use of voter registration lists was constitutionally sacrosanct, again citing Sirhan. The court responded that it had never said such a method of selecting jurors was unassailable and pointed to language in Sirhan that clearly foreshadowed the holding now under review:

> "In Sirhan, however, this court held that '[t]he use of voter registration lists as the sole source of jurors is not constitutionally invalid [citations], at least in the absence of a showing that the use of those lists resulted "in the systematic exclusion of a 'cognizable group or class of qualified citizens'" [citations], or that there was "discrimination in the compiling of such voter registration lists." [Citations.]' (Id., at pp. 749-750.) However, it is exactly the requirement of Sirhan regarding exclusion of a cognizable group that defendant has attempted to show." (36 Cal.3d at p. 57, emphasis added.)

It never has been the law that voter registration lists are unassailable. Even the authorities cited by petitioner recognize this.[4/] Attacks on voter registration lists have been going on for years, but have uniformly failed because either the defendants presented no proof (e.g., Sirhan) or because the state had come forward with convincing rebuttal evidence.

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4. Davis v. Zant (11th Cir. 1983) 721 F.2d 1478, 1484: Although "courts have sanctioned the use of voter registration lists as the sole means of jury selection . . . the use of such lists does not establish as a conclusive fact that a true cross-section of the community is being drawn."

State v. Gretzlar (Ariz. 1980) 126 Ariz. 60, 612 P.2d 1023, 1040: "The use of voter registration lists as a sole source of jurors is not constitutionally infirm absent a showing of systematic exclusion in the compiling of such lists."

It is respondent's uncontroverted proof that makes this case unique. What the California Supreme Court did was to apply principles settled by Duren and Taylor[5] to a case where "the state has not attempted to rebut the defendant's proof but has shortsightedly rested its entire argument on the mistaken claim that defendant failed to present a prima facie case." (Harris, 36 Cal.3d at p. 59, emphasis added.)

The opinion below expresses no novel Sixth Amendment doctrine. It is concerned with California rules of evidence. The court saw the "fundamental" question in the case as being which party had the burden of refining the statistical studies to show that a "more narrowly defined population would or would not result in a disparity of constitutional significance." (Harris, 36 Cal.3d at p. 45.) This was answered by a classic Wigmorian analysis of evidentiary burdens.[6] After looking to the difficulty and expense of obtaining the data petitioner claimed is important, and after balancing the parties' opportunity for knowledge, the Court shifted the burden of refinement to petitioner. The ultimate burden of persuasion (on whether the Sixth Amendment has been violated) remained untouched; the court held only that respondent had presented enough evidence to shift the burden of going forward to petitioner.

In fact the treatment of the burden of production issue by the California Supreme Court was not all that

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5. Duren v. Missouri (1979) 439 U.S. 357, 58 L.E.2d 579; Taylor v. Louisiana (1975) 419 U.S. 522, 42 L.Ed.2d 690.

6. 9 Wigmore, Evidence (Chad. Rev. 1981), pp. 292-297.

different from that of this Court in Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248, 253-255, 67 L.Ed.2d 207.) But whether different or not, whether wise or not, the decision below is concerned with matters of state evidence law and is beyond this Court's certiorari jurisdiction.

Without question it is within the power of California to regulate its own legal procedures "including the burden of producing evidence and the burden of persuasion." (Speiser v. Randall (1958) 357 U.S. 513, 523, 2 L.Ed.2d 1460.) This Court has recognized that allocation of the evidentiary burden of production is "an important prodecural device" retained by the States, so they can fairly and expeditiously regulate the course of trials. (Patterson v. New York (1977) 432 U.S. 197, 230, fn. 9, 53 L.Ed.2d 281.)

Federal rights are litigated through the medium of state procedural laws. Within certain broad limits states are free to experiment with their own procedural and evidentiary devices. (Williams v. Georgia (1955) 349 U.S. 375, 382, 99 L.Ed. 1161; Chandler v. Florida (1981) 449 U.S. 560, 582, 66 L.Ed.2d 740.) State rules on how and when to challenge a jury venire have been upheld by this Court as valid exercises of state power.[7] And if states can assign the burden of persuasion to one party or the other, surely no federal issue is raised by a fair and rational allocation of an

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7. Tarrance v. Florida (1903) 188 U.S. 519, 47 L.Ed. 572; Michel v. Louisiana (1956) 350 U.S. 91, 100 L.Ed. 83.

intermediate burden of production.[8] This Court has even dismissed, for want of a substantial federal question, a petition raising the constututionality of a statute allocating the burden of production.[9]

The opinion below stands for the proposition, often stated here, that a prima facie case cannot be met by "mere suggestions or assertions," and that the burden of production calls for admissible evidence, not "argument of counsel." (Duren, 439 U.S. at p. 369; Burdine, 450 U.S. at p. 254, fn. 9.) The court's holding is repeatedly limited to the key fact in this case -- the absence of any rebuttal evidence.[10] The opinion leaves open, for prosecution proof, the many ways in which the single source use of voter lists can be upheld. For example, disparities might be reduced to constitutional limits by showing that the jury was representative of the 20 mile area around the courthouse rather than of the county at large. Or perhaps a longer survey at the courthouse door would reveal a better ethnic mix. Or perhaps the state could come forward with evidence showing

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8. Leland v. Oregon (1952) 343 U.S. 790, 96 L.Ed 1302; see also, Patterson v. New York (1977) 432 U.S. 197, 53 L.Ed.2d 281.

9. Morrison v. California (1933) 288 U.S. 591, 77 L.Ed. 970, discussed in Patterson v. New York, supra, 432 U.S. 197, 230, fn. 9, 53 L.Ed.2d 281 and Morrison v. California (1934) 291 U.S. 82, 78 L.Ed. 664.

10. "In this case, defendant has made a showing adequate to demonstrate, in the absence of rebuttal evidence by the state . . . ." (36 Cal.3d at p. 58, emphasis added.)

"In the present case, however, the state has not attempted to rebut the defendant's proof but has shortsightedly rested its entire argument on the mistaken claim that defendant failed to present a prima facie case." (36 Cal.3d at p. 59, emphasis added.)

there is no significant disparity when minority group eligibles are counted instead of total populations.

The opinion also leaves room for the state to demonstrate that the disparities are not inherently caused by choosing jurors solely from voter registration lists. The prosecutor might show that the underrepresentation does not occur until after the initial drawing is made, perhaps, for example, because Blacks and Hispanics do not mail back the original questionnaire with the same frequency as other ethnic groups. Or that the disparities are caused by statutory qualifications (such as language proficiency) or exemptions (such as hardship) which might fall differently on different ethnic groups.[11/]

And finally, the prosecution might show that any disparity is justified by compelling state interests. That is not an insurmountable burden. In a recent California case the prosecutor came forward with evidence of "explanation and justification" and established that the county was "doing all that reasonably could be expected to achieve the constitutional goal." (People v. Jones (1984) 151 Cal.App.3d 1029, 199 Cal.Rptr. 185, 187.)

The decision below was a legitimate response to a local problem -- at what point during the proof of a controverted fact does the burden of producing evidence shift to the opposing party? This is a matter of state evidence law which need not, and in our federal system, cannot, be of concern here. "It would be a wholly

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11. The California statutes on juror qualifications and exemptions are appended hereto at page 19.

unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not." (Spencer v. Texas (1967) 385 U.S. 554, 568-569, 17 L.Ed.2d 606.)

3. The Federal Rights Asserted By Petitioner Were Not Timely Raised Below

This Court has "consistently refused" to decide federal issues raised for the first time in a petition for certiorari. (Webb v. Webb (1981) 451 U.S 493, 499, 68 L.Ed.2d 392; 28 U.S.C. § 1257.) It is equally established that "the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, ..." (Herndon v. Geogia (1935) 295 U.S. 441, 443; 79 L.Ed. 1530.)[12/]

Petitioner did not request an evidentiary remand until the petition for rehearing. This could have been advanced in earlier briefs as an alternative form of relief, but was not. The presumption now is that the request was denied under a long established California rule that a party will not be heard "to suggest upon petition for rehearing, that, after all, there are questions of fact which [it]

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12. This is not a case where a state court ruling was so unanticipated that the federal question could only have been raised on rehearing. As discussed above, the result in this case was clearly foreshadowed by Sirhan. Petitioner was bound to have known this and cannot claim surprise. Stern & Gressman (5th ed. 1978) Supreme Court Practice, p. 221.

desires to have determined, and upon which [it] might have relied, had [it] chosen to do so." (Atherton v. Sup. San Mateo Co. (1874) 48 Cal. 157, 160; County of Imperial v. McDougal (1977) 19 Cal.3d 505, 513, 138 Cal.Rptr. 472.)

Even if the petition for rehearing was a timely assertion of the State's constitutional rights, it was not done with the specificity required to invoke this Court's jurisdiction. The petition for rehearing asks for a remand under a state statute only.[13/] It does not even contain a hint that any federal rights are being asserted.[14/] While this Court's jurisdiction may "not depend on citation to book and verse" (Eddings v. Oklahoma (1982) 455 U.S. 104, 113, fn. 9, 71 L.Ed.2d 1) it at least requires that the state court be "apprised of the nature or substance of the federal claim . . . ." (Webb v. Webb (1981) 451 U.S. 493, 501.) The California court was never told that its decision to reverse without an evidentiary remand implicated federal rights. On this record the assumption must be that petitioner's Duren/Fourteenth Amendment claim was not passed on "'due to want of proper presentation in the state courts.'" (Exxon Corp. v. Eagerton (1983) ___ U.S. ___, 76 L.Ed.2d 497, 504, fn. 3; Hanson v. Denckla (1958) 357 U.S. 235, 243, 2 L.Ed.2d 1283.)

The Petition for a Writ of Certiorari should be

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13. The Petition for Rehearing remand argument is reproduced in the Petition for a Writ of Certiorari at pages 139-149.

14. Since the federal rights were not raised below, there has been a concomitant failure to comply with Rule 21.1(h)'s requirement that the petition contain "such pertinent quotation of specific portions of the record . . . as will show that the federal question was timely and properly raised."

denied because the federal rights asserted were never "raised, preserved, or passed upon in the state courts below." (Cardinale v. Louisiana (1969) 394 U.S 437, 438, 22 L.Ed.2d 398.)

4. Conclusion

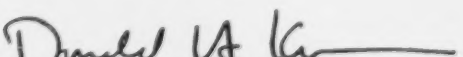
"The State offered no evidence at all either attacking respondent's allegations of [constitutional disparity] or demonstrating that his statistics were unreliable in any way . . . In light of the State's abdication of its responsibility to introduce controverting evidence . . . respondent was entitled to prevail." (Casteneda v. Partida (1977) 430 U.S. 482, 488, 492, 51 L.Ed.2d 498.)

Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Dated this 14th day of September 1984, at Los Angeles, California.

Respectfully submitted,

FRANK O. BELL, JR.
State Public Defender

By 
DONALD L.A. KERSON
Deputy State Public Defender

Attorneys for Respondent

LONG BEACH, CALIFORNIA, THURSDAY, APRIL 17, 1980; 10:10 A.M.

DEPARTMENT SOUTH C HON. D. STERRY FAGAN, JUDGE

APPEARANCES:

The defendant with his counsel, DENNIS W. CARROLL, Deputy Public Defender of Los Angeles County; KURT S. SEIFERT, Deputy District Attorney of Los Angeles County, representing the People of the State of California.

". . . .

"MR. SEIFERT: The People's position is quite simple. We feel that the selection of registered voters drawn at random by the registrar from the registrar of voters rolls by the jury commissioner satisfies the law as it exists today and we are in a position to stipulate to any evidence counsel wishes to present regarding demography, population, ethnic variances over the area of this judicial district or anything of that, in that regard that he considers forms a basis for the challenge.

"We will basically submit that once the evidence that the juror rolls are drawn at random from registered voters is before the Court, that that will satisfy the requirements of Code of Civil Procedure Sections 204, et seq. and will satisfy the law as the People believe it exists under certain cases that I will cite to the Court at the appropriate time.

"We are willing to stipulate with counsel to any evidence of demography, that is, population, ethnic balances or numbers of various groups within the judicial district if that is within his evidence, he wishes to present. Our position is that the method that is used now that will be subject of stipulation is a fair one and does not fly in the face of the defendant's right to a fair trial and of a fair cross section of the community represented upon the jury that he will be afforded in this particular case.

"So I am willing to basically stipulate with counsel the contents of all the evidentiary matters in the former motion that was presented. It is a considerable number of pages of testimony, I believe several hundred, at least, and supplemented, I understand, by Mr. Butler's testimony this afternoon as to the specifics of the demography and population complexion, if you will, of the Long Beach Judicial District.

"All of those things I am willing to stipulate to and I believe that based on the cases of Rubio vs. Superior Court, Adams vs. Superior Court and People vs. Sirhan that the defendant in the brief written notice he has given has laid out at least the prima facie grounds upon which he can challenge the jury, but I don't feel factually he will be able to carry forward his challenge. I will be willing to stipulate to most anything." (RT 306-307).

* * * * * *

LONG BEACH, CALIFORNIA; TUESDAY, APRIL 22, 1980; 1:35 P.M.

DEPARTMENT SOUTH C HON. D. STERRY FAGAN, JUDGE

(Appearances as heretofore noted.)

". . . .

"MR. SEIFERT: All right. I must take issue with the basic foundation upon which the defense, if you will, house of cards is built in that the defendant would argue apparently that he and his witnesses and evidence have made out a prima facie case of discrimination. I suggest the evidence is not conducive to that conclusion and does not lead to that conclusion because the nature of the evidence itself, as I attempted to focus, at least in part on the cross-examination of Dr. Butler, shows this Court, I think, clearly that his figures and facts are as speculative as his conclusion that all Spanish-surnamed persons in California are citizens. Such a preposterous statement and assumption by a demographer, whose sworn obligation as a witness is to present reliable information to this Court, flies in the face of reason and shows that Dr. Butler is closing his eyes to certain realities that everyone in this community is confronting. And that is the great deal of influx of illegal aliens of Spanish descent into our community, which is a large problem, not one that can be ignored by the mere assumption that all Spanish-surnamed persons are citizens for purposes of his statistics.

"His evidence that he presents is also speculative in that it does not get to the heart of the matter. The Supreme Court of the United States has never indicated to this day that a jury venire must mirror the ethnic balance, if you will, in the community but merely has indicated that it must reflect a fair cross section. That's totally different than a mirror. And the California Supreme Court and the appellate courts in California have consistently held that a review of the demographic makeup of the people of the community cannot be taken from the people as a whole but must reflect the eligible jurors in the community and how they stack up against the jury venire. And particularly in the case of Adams vs. Superior Court, 27 Cal.App.3d 719, the Court discusses the difference between a challenge of discrimination versus statistics from the entire community versus a more reliable challenge based on the statistics reflecting the makeup of the eligible jury or juror population. And the Court concludes clearly that a much greater disparity between the population as a whole and the jury venire will be permitted because it is assumed that there are many more people than are eligible for jury service. And all of the questions on

cross-examination that I attempted to get answers to from Dr. Butler focused on the very fundamental issue, does his survey or any survey he is aware of focus on the eligible juror population as the measure against which we compare the jury venire? And the answer was a resounding no in that Dr. Butler concluded that there was no available source material to determine eligible juror population, but he did concede that the only possible source of statistical information that would lead to likely eligible jurors was the list of registered voters, which both statutorily is called for as the basis for the jury venire in the Code of Civil Procedure, Section 214, and also that defines the qualifications for jurors and, further, that has been approved as the single source of jurors and is constitutional under the following cases: People vs. Sirhan, 7 Cal.3d 710; People vs. Waw, W-a-w, 74 Cal.App.3d 633; People vs. Cabral, C-a-b-r-a-l, 51 Cal.App.3d, page 707; People vs. Breckenridge, 52 Cal.App.3d 913; and People vs. Newton, N-e-w-t-o-n, at 8 Cal.App.3d 359. All of those cases have concluded that the statutory permission to use the jury list as the single source of jurors is constitutionally valid.

"I think the prime point by the defense is it is premature in many aspects and speculative in many. It is speculative in the updating of a ten-year-old census, which is not reliable in the first place as a factual basis upon which to conclude the present population makeup, and further it is speculative in that it doesn't divide its inquiry into looking at the eligible juror population versus the many, many ineligible aliens, the many, many people who do not speak English, the many, many people who are infirm or unqualified as jurors for other reasons, for many, many people who have been convicted of felonies and would not be eligible for jury service, and all of the other persons who, for other reasons, would not be eligible for jury service. So in looking at the population as a whole, we get an unfair and a distorted picture as to who could be a juror, if they wanted to, and I suggest that the evidence of the defense is largely speculative because of that particular area of their inquiry, looking at the population as a whole.

"I don't think, and I think the Court will be forced to agree, in reviewing the evidence submitted by virtue of these various documents that the defense has made out a prima facie case of the type of invidious discrimination that is required in the Supreme Court cases cited before the system of selection of jurors, either grand jurors or petit jurors, is thrown out as

unconstitutional and discriminating. I will quote from Taylor vs. Louisiana, at 419 U.S. 522. The law edition cite is 42 Law Edition 2d 690. And the law says there at page 702 of the law edition report, and I quote, 'The fair cross section principle must have much leeway in application. The states remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions, so long as it may be fairly said that the jury lists or panels are representative of the community.'

"We have the evidence of the defendant's own expert, who, in his opinion, stated in answer to three separate questions on cross-examination that he assumes that the juror rolls, particularly those in Long Beach, are comprised of a fair cross section of the registered voters in the community. He cannot point to any discrimination by virtue of any invidious criteria such as race, creed, color, sex, age, income or any other criteria that indicates to him that jurors are excluded because of any of those reasons. He's told us, and the evidence submitted by stipulation also substantiates, that jurors are chosen completely at random, without regard to any illegal critera and are only excused upon a showing of good cause that they must bring forward, not automatically excused, as was the case in Duren vs. Missouri, cited in the various papers presented to Your Honor.

"We have a situation here where the People of the State of California and all public agencies are making a conscientious effort to draw more and more people into those rolls of registered voters. It is quite clear that there is an ongoing public relations campaign to get everyone who is eligible to vote to get out and do so, to make themselves a part of the system, if you will, to get them involved in the processes of government and particularly jury service and voting.

"It would appear then that the basic challenge, if there is one, that counsel, through his witnesses, is pointing to is that our law discriminates against unregistered voters, if anything, because those are the people or all of those people who are unregistered voters are not brought into the jury venire selection pool. And in order to establish that that is of constitutional dimension, it is required under the cases of Castaneda vs. Partida, and all of the other cases cited to the Court in the submitted documents that the discrimination must be against, quote, a cognizable group, unquote.

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"Adams vs. Superior Court, which is controlling in this particular case, states, and I will quote - I am sorry. It is People vs. Sirhan, at 7 Cal.3d 710. The California Supreme Court has stated that those who do not choose to register to vote cannot be considered a cognizable group within the meaning of those cases cited. And that is at page 750 of the Court's opinion, which begins at page 710. So if the statistics, if the testimony of Dr. Butler has any meaning at all, what he is telling us is we are not including within the jury venire people who are not registered voters. The California Supreme Court tells us that is not a cognizable group within the constitutional definition of that phrase by the U.S. Supreme Court. Further, the statistics are meaningless, since they don't cover the eligible juror population, as compared to all people physically located in the, quote, community, end of quote. I think counsel's evidence and all that submitted falls short of a viable challenge to our system. And the fact of the system changing, according to Dr. Butler, to include DMV registrants in the pool does not render this system today violative of the constitutional protection of this defendant to a fair trial by a jury that's a representative cross section of the community. And the evidence would be apparently, according to Dr. Butler, that the jury does represent an eligible cross section of the community in that the eligible jurors are chosen from the registered voters who are all required to be citizens and otherwise apparently eligible for jury service under the definitions. I submit it." (RT 433-438.)

* * * * * *

Code of Civil Procedure section 198:

"A person is competent to act as juror if he or she is:

"1. A citizen of the United States of the age of 18 years who meets the residency requirements of electors of this state;

"2. In possession of his or her natural faculties and or ordinary intelligence, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which substantially impairs or interferes with the person's mobility; and

"3. Possessed of sufficient knowledge of the English language.

". . . ."

Code of Civil Procedure section 199:

"A person is not competent to act as a trial juror if any of the following apply:

"(a) The person does not possess the qualifications prescribed by Section 198.

"(b) The person has been convicted of malfeasance in office or any felony or other high crime.

"(c) The person is serving as a grand juror in any court of this state."

Code of Civil Procedure section 200:

"The court shall excuse a person from jury service upon finding that the jury service would entail undue hardship on the person or the public served by the person."

* * * * * *

Code of Civil Procedure section 203:

"Each court shall adopt rules supplementary to such rules as may be adopted by the Judicial Council, governing the selection of persons to be listed as available for service as trial jurors. The persons so listed shall be fairly representative of the population in the area served by the court, and shall be selected upon a random basis. Such rules shall govern the duties of the court and its attaches in the production and use of the juror lists. In counties with more than one court location, the rules shall reasonably minimize the distance traveled by jurors. In addition, in the County of Los Angeles no juror shall be required to serve at a distance greater than 20 miles from his or her residence."

Code of Civil Procedure section 204.7 (in part):

"(a) Source lists of jurors shall identify persons who reside in the county, and who are 18 years of age or older, shall include those who are registered voters, and to the extent that systems for producing jury lists can be practically modified, without significant cost, shall also include those who have been licensed or issued an identification card pursuant to Article 3 (commencing with Section 12800) and Article 5 (commencing with section 13000) of Chapter 1 of Division 6 of the Vehicle Code. Qualified jury lists and master jury lists derived from the source lists shall be prepared so as to reasonably minimize duplication of names."

* * * * * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-265

STATE OF CALIFORNIA,

Petitioner,

v.

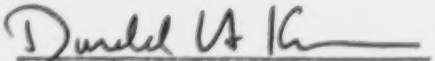
LEE EDWARD HARRIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of California

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, LEE EDWARD HARRIS, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to rule 46. Counsel has not yet received an affidavit from respondent, who is presently incarcerated and awaiting trial in Long Beach, California. Mr. Harris' affidavit in support of this motion will be forwarded to this Court immediately upon receipt.



DONALD L.A. KERSON
Deputy State Public Defender

Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-265

STATE OF CALIFORNIA,	:	
Petitioner,	:	
-against-	:	AFFIDAVIT
LEE EDWARD HARRIS,	:	
Respondent.	:	

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) s.s.:

DONALD L.A. KERSON, being duly sworn, states:

1. I am a Deputy State Public Defender and counsel to LEE EDWARD HARRIS in California v. Harris, now pending in this Court on petition for writ of certiorari. I make this affidavit in support of Mr. Harris' motion for leave to proceed in forma pauperis.

2. Mr. Harris is presently in the custody of the State of California and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Harris by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Harris is attached hereto.

3. Counsel was appointed to represent Mr. Harris at trial, on appeal, and on these post-appeal proceedings.

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4. I am informed and believe that because of his poverty, Mr. Harris is unable to pay the costs of this cause or to give security for same.

Donald L.A. Kerson

DONALD L.A. KERSON
Deputy State Public Defender

Sworn to before me this
13th day of September 1984.

Adrian K Panton

NOTARY PUBLIC

My commission expires:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-265

STATE OF CALIFORNIA,	:
Petitioner,	:
-against-	:
LEE EDWARD HARRIS,	:
Respondent.	:

I, LEE EDWARD HARRIS, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am presently incarcerated, and have been for the past five years; I receive no income from earnings, and have no cash or checking or savings account.

3. I am unable to give security for said cause.

4. Counsel was appointed to represent me at trial, on my direct appeal, and on these post-appeal proceedings.

LEE EDWARD HARRIS

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) s.s.:

The foregoing affidavit of LEE EDWARD HARRIS was subscribed and sworn to before me this ____ day of _____

NOTARY PUBLIC

My commission expires:

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

STATE OF CALIFORNIA,	:
Petitioner,	:
-against-	:
LEE EDWARD HARRIS,	:
Respondent.	:

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the Brief in Opposition and Motion to Proceed in Forma Pauperis, by depositing said in the United States Mail, postage prepaid and properly addressed to John K. Van De Kamp, Attorney General, John R. Gorey, Esq., Deputy Attorney General, Room 800, 3580 Wilshire Boulevard, Los Angeles, California 90010, and Clerk, California Supreme Court, 4250 State Building, 455 Golden Gate Avenue, San Francisco, California 94102.

All parties required to be served have been served.

Dated this 14th day of September 1984, at Los Angeles, California.

DONALD L.A. KERSON
Deputy State Public Defender
107 South Broadway, Suite 9111
Los Angeles, California 90012

NO. 84-265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF CALIFORNIA,

Petitioner,

V.

LEE EDWARD HARRIS,

Respondent.

ON APPLICATION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF OF AMICI CURIAE, THE STATE OF ARKANSAS, THE STATE OF CONNECTICUT, THE STATE OF OKLAHOMA, THE STATE OF OREGON, THE STATE OF MISSISSIPPI, THE STATE OF MISSOURI, THE STATE OF MONTANA, THE STATE OF NORTH DAKOTA, AND THE STATE OF WYOMING,* IN SUPPORT OF PETITIONER STATE OF CALIFORNIA

Of Counsel:
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Assistant Professor of Law
South Texas College of Law
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Assistant Professor of Law
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DAVID CRUMP
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Counsel of Record

**Each sponsored according to Rule 36.4 by its attorney general pursuant to list of counsel continued inside front cover*

List of Counsel, continued:

The State of Arkansas, by and through Attorney General Steve Clark and Assistant Attorney General Leslie Powell;
The State of Connecticut, by and through Chief State's Attorney Austin J. McGuigan and Assistant State's Attorney John M. Massameno;
The State of Mississippi, by and through Attorney General Edwin Lloyd Pittman and Assistant Attorney General William S. Boyd III;
The State of Missouri, by and through Attorney General John Ashcroft and Assistant Attorney General John M. Morris;
The State of Montana, by and through Attorney General Michael T. Greely and Assistant Attorney General Chris D. Tweeten;
The State of North Dakota, by and through Attorney General Robert O. Wefald;
The State of Oklahoma, by and through Attorney General Michael C. Turpen and Assistant Attorney General Robert W. Cole;
The State of Oregon, by and through Attorney General Dave Frohnmeyer;
The State of Wyoming, by and through Attorney General A. G. McClintock.

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NO. 84-265

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF CALIFORNIA,

Petitioner,

V.

LEE EDWARD HARRIS,

Respondent.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

The decision below undermines confidence in the most basic procedure in our criminal jurisprudence. Contrary to all other decisions, it rejects a traditional method of jury summoning that is used in nearly all States and in many federal districts. It makes fundamental questions depend upon complex and shifting statistical evidence, invites case-by-case challenges in each district of each jurisdiction, and could result in different meanings for the Constitution from district to district.

Amici are all States that permit or require local districts to compose juries by the method used in this case. Amici submit that this method has enduring value and that it should not be held unconstitutional. In any event, amici submit that the questions presented should be promptly resolved. If the States must rely upon district-level statistical proofs to determine the current validity of jury trial results (as amici submit they should not), then amici respectfully urge the Court to set standards expeditiously. If the traditional method is to be upheld, as amici submit it should, the uncertainty generated by the decision below affecting this most basic process should be promptly dispelled.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case made by Petitioner, the People of California.

Amici would emphasize that the decision of the California trial court was made as a matter of law, to the effect that respondent Harris' evidence did not demonstrate that traditional jury selection methods were unconstitutional. Amici would respectfully submit that the issue should be so decided and should not depend upon variations in statistical evidence from locality to locality. Amici would further emphasize that the California court's opinion contains no statement of a state ground that would prevent review, and certainly it contains no clear statement of the kind necessary under this Court's decisions.

REASONS FOR GRANTING THE WRIT

I. THE CASE IS PROPERLY PRESENTED TO THE COURT FOR REVIEW.

In considering a stay, Mr. Justice Rehnquist indicated that an independent state ground might be relevant to this Court's review. With deference, amici submit that the case is squarely presented.

The Court's decision in *Michigan v. Long*, 103 S.Ct. 3469 (1983), resolves the issue and indicates that the case is properly before the Court on the federal questions presented. The defendant in *Long* argued, just as defendant argues here, that ambiguous "references to state [law]" in the opinion below had "established an independent and adequate state ground." *Id.* at 3474. The Court began its analysis of this issue by forthrightly recognizing that, prior to *Long*, when there had been ambiguities in the state law grounds alleged by a defendant, the Court had considered them *ad hoc* and had "not developed a satisfying and consistent approach for resolving this vexing issue." Therefore, the Court's purpose in *Long* was to establish such a clear and consistent standard to be used in subsequent cases. *Id.* at 3475.

This approach was as follows: When a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law," the Court will assume that federal law is the basis of decision in the absence of a clear contrary statement.[1] *Long* thus requires that an independent and adequate state ground not be ambiguous, but instead be *clearly and plainly expressed as the basis for decision:*

> . . . If a state court chooses to [decide an issue solely on state grounds], then it need only make clear by a plain statement that the federal cases . . . do not themselves compel the result . . . . If the state court decision indicates clearly and expressly that it is based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision.

Id. at 3476. The Court emphasized, however, that "we require a clear and express statement." [2] The Court will "assume that

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1 It should be noted at the outset that no state ground arguably present here could have been "independent" of federal law. "[W]here the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." Enterprise Irrigation Dist. v. Farmers Mut. Cas. Co., 243 U.S. 157, 164 (1917), cited in Long, supra, at 3474.

2 "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications of state courts do not stand as barriers to determination by this Court of the validity under the federal constitution of state action."

Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940). See also, e.g., South Dakota v. Neville, 103 S.Ct. 916 (1983); Texas v. Brown, 103 S.Ct. 1535 (1983) (use of federal law to guide decision, cf. Long, supra, at 3475); Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982) ("intermixed" federal and state questions "required" review).

there are no such grounds when it is not clear from the opinion" that they are the actual basis of decision. *Id.* In *Long*, the Court held the issues reviewable because it remained "unconvinced" that independent state grounds were alone sufficient to compel the result.

In the case at bar, the People of California take the position that the law properly applied to the record would uphold the jury venire. The California Supreme Court, on the basis of federal cases,[3] decided to the contrary. There is no identification of any principle of state law that requires such a result. If there is anything that is clear from the opinion, indeed, it is that it lacks any clear statement of a ground based on state law that would control the outcome.[4] Mr. Justice Rehnquist stated, "I cannot at this stage of the proceedings determine even to my own satisfaction which is the correct view of California law . . . ." *People v. Harris*, 53 U.S.L.W. 3029 (U.S.S.Ct. July 23, 1984) (opinion on stay). Mr. Justice Rehnquist further described the matter as a "procedural snarl," found himself required to determine what the California court meant "in substance," and noted that there was apparent disagreement concerning the basis for the decision. *Id.* Under *Long*, these characterizations mean that an independent state ground is not presented and that the case is before the Court for review.

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3 The California decision was based principally upon Duren v. Missouri, 439 U.S. 357 (1979). Duren involved a challenge to a jury exemption that facially treated men and women differently (specifically, it was available to women but not men). The use of voter registration lists is neutral, traditional, and in no sense a device to discriminate. The State's position, simply stated, was that the record did not implicate the constitutional violation found in Duren or any violation related to it.

4 Mr. Justice Rehnquist stated that the California opinion "says in substance that the State failed to preserve the" error (emphasis added). But this, by definition, was an inference from ambiguous statements. Further, there are sound reasons to avoid such an inference. See notes 5-6 infra.

The policy basis of *Long* also supports this conclusion. As the Court there recognized, delving into state courts' interpretations of state law to identify or resolve perceived ambiguities defeats the very deference that is intended.[5] The Court further pointed out that vacation and clarification were unworkable. Finally, experience had shown that failure to grant review "was not a panacea because . . . there is an important need for uniformity in federal law, and . . . this need goes unsatisfied when we fail to review an opinion that rests primarily on federal grounds and where the independence of the alleged state ground is not apparent from the four corners of the opinion." *Id.* at 3476. This passage could have been written to describe the case at bar.

In the case at bar, an erroneous interpretation of federal law should not be insulated from review by a construction of the opinion that imputes to the California court a "Catch-22" position. It would not be deference so to regard the California opinion. Yet such a "Catch-22" would unavoidably result from considering the opinion below as based upon an alleged failure to preserve error. It must be remembered that the People of California *prevailed* at the trial level, upon a decision with which they agreed. The trial judge adopted the People's position that the opposition had not established a prima facie case. That decision (which was similar to a directed verdict) prevented the People from presenting evidence. Under these circumstances, the opinion of the California Supreme Court cannot be read as charging the People with failure to preserve error, since they had no error harmful to them to complain of at the relevant time. This

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5 In evaluating an emergency matter such as a stay, a court must necessarily look at all aspects of the case tentatively. Thus the examination of California law and testing of its basis in the stay application was appropriate. Such a reexamination would be inappropriate at this subsequent stage. It is desirable that state courts "be asked rather than told what they have intended." Herb v. Pitcairn, 324 U.S. 117, 128 (1945). The desirability of avoiding an accusation that the California Supreme Court somehow muddled California law is precisely in line with the purpose underlying Long.

analysis confirms the appropriateness of following *Michigan v. Long* rather than attempting to reinterpret a state court's possible application of state law.[6]

II. THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH SEVERAL DECISIONS OF COURTS OF APPEALS. IT FURTHER PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT.

Several courts of appeals have considered the question at issue and have rendered judgments squarely in conflict with the present opinion.[7] This Court should grant the writ to resolve those conflicts, which threaten the finality of judgments and which would necessitate that thorough defense counsel raise the issue in every case by exhaustive evidence even in those circuits that have finally decided it.[8]

Further, the case presents substantial questions that affect jurisdictions throughout the country. The overwhelming major-

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6 See note 4 supra.

7 E.g., United States v. Clifford, 640 F.2d 150, 156 (8th Cir. 1980); United States v. Jones, 687 F.2d 1265, 1269-70 (8th Cir. 1982); United States v. Wesevich, 666 F.2d 984, 990 (5th Cir. 1982); United States v. Lewis, 472 F.2d 252 (3rd Cir. 1972); Davis v. Zant, 721 F.2d 1478, 1482-85 (11th Cir. 1984). It is important to realize that the alleged procedural issue does not affect the conflict. These decisions assume that disparate registration of identifiable groups would occur, but hold that the resulting jury composition is not unconstitutional. E.g., United States v. Clifford, supra, 640 F.2d at 156. See also state court cases cited in note 9 infra.

8 Even in jurisdictions with decisions contrary to the California decision here at issue, counsel may understandably perceive the need to offer proof as a means of preserving the issue until this Court decides it. This perception would especially be understandable in capital cases, in which broad accusations of incompetence of trial counsel are common.

ity of States permit juries to be summoned by the means used here. Many such jurisdictions provide *only* for summonses of registered voters. *E.g.*, Fla. Stat. Ann. sec. 40.01 (West Supp. 1984); 38 Okla. Stat. 1981, sec. 18(b); Tex. Rev. Civ. Stat. Ann. art. 2100a (Vernon Supp. 1984); Wyo. Stat. sec. 1-11-101 *et seq.* (1977). Other jurisdictions provide that local districts may use voter registration lists and are not required to supplement them (although they may do so). *E.g.*, Pa. Consol. Stat. Ann. sec. 4521 (Purdon Supp. 1984) (expressly stating that supplementation "will not be required"); N.Y. Consol. Laws Ann., Judiciary Law, sec. 506 (McKinney Supp. 1984).

There are numerous decisions reviewing such statutes. The decisions have repeatedly held as a matter of law that the use of this method is constitutional.[9] The cited statutes all represent recent codifications by legislatures, and all would be made of doubtful constitutionality by the decision in the case at bar. The importance of the question is enhanced by the fact that the most basic process in our system of justice, that of trial by jury, depends upon it.

The federal Jury Selection and Service Act of 1968, 28 U.S.C. secs 1861 et seq. (1968), provides that federal juries are to be selected from voter registration lists or lists of actual voters. It provides for supplementation only if necessary, and the federal decisions have uniformly upheld federal juries composed solely of registered voters. Reliance upon actual voters would presumably narrow the pool but is nevertheless authorized. This Act appears in part to be an exercise of Congress' power to enforce

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9 An inspection of only the most recent state cases shows the following: Sanders v. State, 426 So.2d 497 (Ala. Crim. App. 1982); State v. Bernal, 671 P.2d 399 (Ariz. 1983); Lloyd v. State, 448 N.E. 2d 1062 (Ind. 1983); State v. Reeves, 671 P.2d 553 (Kan. 1983); State v. Brogden, 426 So.2d 158 (La. 1983); State v. Briscoe, 646 S.W.2d 424 (Mo. App. 1983); State v. Adcock, 310 S.E.2d 587 (N.C. 1983); People v. Lanahan, 466 N.Y.S.2d 796 (N.Y. App. Div. 1983).

the fourteenth amendment,[10] and since Congress clearly has some authority to interpret the amendment in the exercise of that authority, it would be anomalous if the result were unconstitutional.

Even in the absence of these contrary statutes and decisions, the California court's reliance upon localized statistical evidence rather than upon a uniform measure would present substantial questions. At the very least, this decision means that the constitution may have radically different meanings in Long Beach and in communities a few miles away. That meaning may change over relatively brief periods of time owing to migration patterns. The decision makes the courts dependent upon an abstruse and often misleading kind of evidence, namely the gathering and analysis of statistics, which is particularly capable of partisan manipulation by professional witnesses.[11] The issue has mired courts in such questions as whether the Constitution requires that certain ethnic classes of citizens actually be overrepresented because their non-citizen numbers are large,[12] or whether the venire must conform to the composition of the entire district (or

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10 The Act's statement of purpose indicates an intention that "all citizens" have the "opportunity" to serve. The clearest source of Congressional power for this purpose would presumably be the national citizenship clause of the fourteenth amendment.

The equal "opportunity" for service called for in the Act is fully provided by summoning from voter registration lists.

11 The California court's opinion, in this case, makes the point that the principal defense expert testified repeatedly in favor of motions filed by defendants challenging jury venires in various California districts. No evidence appears showing that the expert attempted to develop factors favorable to the method used here. His sole function, from what appears in the opinion, was to collect statistical evidence showing disparity. Statistical evidence so presented can mislead considerably. As one court said, "the comparative measure may distort reality." United States v. Musto, 540 F.Supp. 346, 355 (D.N.J. 1982), and another pointed out that it can produce "absurd" results, Smith v. Yeager, 465 F.2d 272, 279 n. 18 (3d Cir. 1972).

12 E.g., United States v. Musto, supra, 540 F. Supp. at 356.

just as logically, entire State) even though the composition of those available for local summons is quite different.[13] Most importantly, the decision below replaces a traditional and readily available method with an ad hoc, case-by-case evaluation of the constitutionality at district level of the overall system of summoning jurors, depending upon complex and variable proof. Such an approach to a system functioning district- or state-wide is undesirable because it logically must give the right to each defendant in each case to make such an evidentiary attack, so as to produce inconsistent results.

Finally, the California court's decision presents a substantial question whether "systematic exclusion" is to be found in an action by a state that is neutral in all respects and allows equal opportunity to all. In every jurisdiction, numbers of summoned persons do not appear for jury service, and no jurisdiction can effectively enforce jury summonses by arrest. The enhancement of the numbers of persons who are summoned but fail to appear would induce disrespect for the law. Such a result would occur if persons who had not undertaken the convenient step of registration were summoned to the less convenient task of jury service. Whether the consideration of statistical evidence for each independent venue, district, or even defendant, is justified in the face of these disadvantages, so that such proof makes unconstitutional the use of a traditional neutral criterion linked to self-government by civic duties similar to those of jury service, is a question that should be decided by this Court.

CONCLUSION

The case at bar is properly before the Court, and the Court

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13 The California court faced this question in this case. Jurors for the venire were here summoned from the vicinage of Long Beach, but jury composition was actually compared not with Long Beach but with the entire county of Los Angeles. The court below considered but did not decide whether local summonses must mirror the county (in which event overrepresentation of some local groups would presumably be necessary), but it decided that, in this case, the figures were sufficient to show a constitutional violation.

should grant the writ to resolve the conflicts and consider the substantial questions presented.

Respectfully submitted,

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